Fordham Law Review

Volume 73 | Issue 6 Article 7

2005

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## Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law. I would like to thank Professor Elizabeth Cooper for her insight and guidance in the writing of this Note.

# THE FLAWS OF RATIONAL BASIS WITH BITE: WHY THE SUPREME COURT SHOULD ACKNOWLEDGE ITS APPLICATION OF HEIGHTENED SCRUTINY TO CLASSIFICATIONS BASED ON SEXUAL ORIENTATION

*Jeremy B. Smith**

"I wonder who it was defined man as a rational animal. It was the most premature definition ever given."[1]

## INTRODUCTION

After harsh losses regarding the rights of gay men and lesbians to marry in the November 2004 election, proponents of gay rights have begun to contemplate the adoption of a more incremental approach to full marriage rights that would involve securing the component rights of marriage, such as survivor benefits, hospital visitation privileges, and tax breaks for gay couples, rather than the right to marry itself.[2] As this debate evolves and continues to permeate our society and our courts, the importance of solid and minimally contestable equal protection jurisprudence in attempts to deal with classifications based on sexual orientation has never been greater. Inherently, this will have consequences for how the rights of gay men and lesbians to marry will be handled.[3] More importantly, it can serve as a reminder that our Constitution "neither knows nor tolerates classes among citizens"[4] as gay men and lesbians seek equality, right by right, with their heterosexual neighbors.

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* J.D. Candidate, 2006, Fordham University School of Law. I would like to thank Professor Elizabeth Cooper for her insight and guidance in the writing of this Note.

1. Oscar Wilde, *The Picture of Dorian Gray*, *in* Collected Works of Oscar Wilde 1, 23 (1997).

2. *See* John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. Times, Dec. 9, 2004, at A1; *see also* William N. Eskridge, Jr. & Nan D. Hunter, Sexuality, Gender and the Law 297 (2d ed. 2004) (noting that "short-term modest advances followed by good or neutral consequences for the community enable larger advances in the long term").

3. *See infra* Parts II.B-II.C.

4. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Traditionally, only a few classifications have merited heightened scrutiny[5]—most notably gender and race classifications. Despite their ostensible qualification for heightened scrutiny based on criteria set forth by the U.S. Supreme Court,[6] gay men and lesbians have not yet been treated as a suspect class and thus classifications based on sexual orientation have been historically subject to rational basis review.[7] The Supreme Court's decisions in *Romer v. Evans*[8] and *Lawrence v. Texas*[9] have added only new confusion to the treatment of sexual orientation classifications under the Equal Protection Clause. This Note analyzes how both federal and state courts have dealt with such classifications in their equal protection analysis in light of the Supreme Court's decisions in *Romer* and *Lawrence.*

This Note suggests that the *Romer* and *Lawrence* decisions imply that the Supreme Court not only ought to make gay men and lesbians a suspect or quasi-suspect class, but that it has in practice already done so, albeit without the sufficient binding force of precedent. This Note argues that an acknowledgment by the Court of its use of a more searching form of rational basis review—a type of heightened scrutiny—for sexual orientation classifications as used in *Romer* and *Lawrence* will resolve the two unintended consequences of those cases. First, the Supreme Court's failure to articulate its more searching form of rational basis review, or what has been called "rational basis with bite,"[10] used in *Romer*, *Lawrence*, and other related opinions, has led to inconsistent judgments in the federal court system as lower courts remain reluctant to veer from traditional deferential review.[11] Second, by acknowledging use of a form of heightened scrutiny, judicial opinions regarding sexual orientation classifications will no longer be as susceptible to criticisms that such opinions are unwarranted examples of judicial activism that defy constitutional precedent in dealing with non-suspect classifications.[12]

Part I of this Note articulates the basic formulations of equal protection jurisprudence, outlines the Supreme Court's opinions in *Romer* and *Lawrence*, and provides a brief overview of pre-*Romer*

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5. This Note uses the phrase "heightened scrutiny" to refer to any level of judicial scrutiny that is more searching than rational basis review, rather than to either intermediate or strict scrutiny. *See, e.g.*, Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237 (1996). For further discussion, see *infra* notes 22-29 and accompanying text.

6. *See infra* Part I.A.2.

7. Eskridge & Hunter, *supra* note 2, at 242; *see also infra* notes 69-73 and accompanying text.

8. 517 U.S. 620 (1996).

9. 539 U.S. 558 (2003).

10. *See* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779, 780 (1987).

11. *See infra* Part II.A.

12. *See infra* Part II.C.

federal case law dealing with sexual orientation classifications.[13] Part II illustrates the inconsistent application of rational basis review to sexual orientation classifications in the federal court system and select state courts which have significantly addressed the issue.[14] Part III proposes that the solution to providing legitimate and consistent equal protection jurisprudence, as applied to homosexuals, lies in not only applying some form of heightened scrutiny to such classifications, but also in explicitly acknowledging its application.[15]

## I. BACKGROUND

This part examines the nature and criteria of suspect class determinations under the Equal Protection Clause in general and then delineates the historical treatment of sexual orientation classifications prior to *Romer*, followed by a discussion of the Court's opinions in *Romer* and *Lawrence*, respectively.

### A. *Suspect Classifications Under Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[16] Equal protection requires that "all persons similarly circumstanced shall be treated alike,"[17] as the Constitution "neither knows nor tolerates classes among citizens."[18] A court should apply some level of heightened scrutiny under equal protection where there is reason to suspect "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to

13. *See infra* Part I.

14. *See infra* Part II.

15. *See infra* Part III. The conclusions of Part III embrace the reasoning of Judge Dooley in his concurrence in *Baker v. State*, 744 A.2d 864, 889-97 (Vt. 1999) (Dooley, J., concurring), which paved the way for civil unions in Vermont, and the reasoning employed by the Washington State Superior Court in *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, at *1 (Wash. Super. Ct. Sept. 7, 2004), which invalidated that state's Defense of Marriage Act ("DOMA").

16. U.S. Const. amend. XIV, § 1. It should be noted that the equal protection arm of the Fifth Amendment, U.S. Const. amend. V, applies to the federal government under the same framework as the Fourteenth Amendment applies to the states. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (stating that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than on state governments to protect certain forms of unequal treatment).

17. Plyler v. Doe, 457 U.S. 202, 216 (1982) (citation omitted).

18. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). This Note will not address the other arm of equal protection analysis that determines whether a classification burdens a fundamental right rather than a suspect class. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

protect minorities."[19] This presumes that classifications which burden some despised or politically powerless groups are likely to reflect antipathy against such groups and that such classifications are inherently suspect and must be strictly scrutinized.[20] As John Hart Ely recognized, "the doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members."[21]

### 1. The Traditional Three Tiers of Review

Conventional equal protection analysis under the Fourteenth Amendment employs three tiers of judicial review based upon the nature of the right or the class affected.[22] If a classification implicates a suspect class, the classification is subject to strict scrutiny, requiring that the state demonstrate that the classification furthers a compelling governmental interest and is narrowly tailored to further that interest.[23] Classifications based on race,[24] national origin and

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19. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). One scholar has described the disadvantage in the political bargaining process faced by such minorities as "empathy failure," which is "the group's inability to make its claims sympathetic to potential bargaining partners." Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum. L. Rev 1753, 1764-65 (1996). Where empathy failure arises, courts have the obligation to "intervene and correct the political process." *Id.* at 1765.

20. *See, e.g.*, *Plyler*, 457 U.S. at 216 n.14. Unlike the Due Process Clause, which exists primarily to safeguard traditional practices against "novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history," the Equal Protection Clause "has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. . . . [T]he Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure." Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988). Though it is beyond the scope of this Note, Sunstein also notes that "statutes that are unaffected by the Due Process Clause may be drawn into severe doubt by principles of equal protection." *Id.* at 1164.

21. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 502-03 (2004) (quoting John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 153 (1980)).

22. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985) (outlining the Court's three tiers of equal protection analysis); *see also infra* Part I.A.2. For a critique of the traditional tiered framework and the doctrine of suspect classification, see Goldberg, *supra* note 21, proposing a single standard of review under equal protection.

23. *See Cleburne*, 473 U.S. at 440.

24. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). Though originally a response to racial issues, some have argued that the enacting Congress intended the Fourteenth Amendment to apply to classifications other than race. *See, e.g.*, Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 Yale L.J. 1153 (1988).

ethnicity,[25] and alienage[26] have been treated as suspect. The Supreme Court has created a middle tier of review for classifications based on gender[27] or illegitimacy[28] commonly referred to as intermediate scrutiny. Classifications affecting such quasi-suspect groups must be substantially related to a sufficiently important governmental interest.[29] All other classifications are reviewed under the rational basis test, under which they are presumptively constitutional as long as they are rationally related to any conceivable, legitimate governmental interest, even if such interest is offered post hoc.[30]

The rational basis test in its traditional form is extremely deferential to any proffered governmental interest.[31] As the Supreme Court has noted, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[32] Under rational basis review, courts are constrained to accept a legislature's generalizations even in the presence of an imperfect fit between means and ends.[33] Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[34] Moreover, the party challenging the legislation bears the burden of

25. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 479 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

26. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 218-23 (1982); Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

27. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion).

28. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Levy v. Louisiana, 391 U.S. 68, 72 (1968).

29. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985).

30. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (holding that a restructured retirement system denying windfall benefits to certain employees while permitting them for others was rationally related to maintaining system); Geduldig v. Aiello, 417 U.S. 484, 495 (1974) (holding that a state disability insurance program's policy of excluding coverage of disabilities resulting from pregnancy was rationally related to interest in maintaining self-supporting system); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (upholding statute prohibiting opticians from fitting lenses without a prescription, though seemingly a needless and wasteful requirement, as a valid exercise of legislature's discretion to treat one aspect of a field differently from others for consumer protection); Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) (holding that potential traffic hazards justified an exemption of vehicles advertising the owner's products from general advertising ban); *see also Cleburne*, 473 U.S. at 440.

31. *See supra* note 30 and accompanying text.

32. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

33. Heller v. Doe, 509 U.S. 312, 321 (1993) (upholding a lower standard of proof in commitment proceedings for the mentally retarded than for the mentally ill though the distinctions between such groups may be imperfect). "[L]egislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (citations omitted).

34. *Beach Communications*, 508 U.S. at 313.

negating every conceivable rational basis for the classification, regardless of whether or not such a rationale—or any at all—was actually relied upon by the relevant authority.[35]

In addition to the three tiers outlined above, an additional category of equal protection called "rational basis with bite" has developed, though it remains ill defined.[36] Under rational basis with bite, a court, "while purporting to use the rational basis test, actually applies some form of heightened scrutiny and invalidates the challenged law after a close examination of the law's purpose and effects."[37] Rational basis with bite has been applied primarily, if not exclusively, in cases where the classification at issue inappropriately discriminated against a particular minority and the government's asserted interests had no rational relationship to that discrimination.[38] As Justice O'Connor noted, "[w]hen a law exhibits such a desire to harm a politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[39]

### 2. The Test for Heightened Scrutiny

Although the Supreme Court has espoused a three-part test to determine what classifications warrant traditional heightened scrutiny, such determinations have proven more complex in practice than simply analyzing these three elements.[40] The test, elicited in *Bowen v. Gilliard*,[41] allows heightened scrutiny when a person (1) has suffered a history of discrimination; (2) exhibits obvious, immutable or distinguishing characteristics that define him as a member of a discrete group; and (3) shows that the group is politically powerless or a minority, or the statutory classification at issue burdens a fundamental right.[42]

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35. *Id.* at 313-15.

36. Kevin H. Lewis, Note, *Equal Protection After* Romer v. Evans*: Implications for the Defense of Marriage Act and Other Laws*, 49 Hastings L.J. 175, 180 (1997); *see* Pettinga, *supra* note 10, at 779-80.

37. Lewis, *supra* note 36, at 180.

38. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (finding ordinance requiring the mentally retarded to acquire special permit for group home based on irrational prejudice); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 543 (1973) (finding provision of Food Stamp Act requiring household members to be related so as to prevent participation in the program by "hippies" did not operate to rationally further the prevention of fraud).

39. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

40. *See infra* notes 43-62 and accompanying text.

41. 483 U.S. 587 (1987).

42. *Id.* at 602-03; *see* Eric A. Roberts, *Heightened Scrutiny Under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation*, 42 Drake L. Rev. 485, 496-97 (1993) (arguing that sexual orientation classifications merit heightened scrutiny under the Supreme Court's three-part test in *Bowen*).

In practice, the Supreme Court's holdings indicate that heightened scrutiny has two essential elements and two buttressing factors that may be used if relevant to the particular class in question.[43] The first essential element is that the classification must be unrelated to a person's ability to contribute to society[44] as such laws are likely to "reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others,"[45] or "reflect outmoded notions of the relative capabilities" of those who possess such characteristics.[46] The lack of a relationship between a law and the characteristic against which it discriminates indicates that the law is not a result of "legislative rationality in pursuit of some legitimate objective," but rather a reflection of "deep-seated prejudice."[47]

The second essential element is that the group disfavored by the classification must have experienced a history of intentional discrimination.[48] A complainant must demonstrate a history of intentional, invidious discrimination against the group of which he is a member because of the characteristic at issue.[49] For example, with regard to sex discrimination, the Supreme Court noted the nation's "long and unfortunate history of sex discrimination" against women.[50] Age classifications, in contrast, do not merit heightened scrutiny under either of these elements as the elderly "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[51]

The other two factors—the immutability of the characteristic and the political powerlessness of the group—though not essential to applying heightened scrutiny, may enhance the need for its application.[52] The immutability element was first used as an argument

43. *See infra* notes 44-62 and accompanying text; *see also* Brief of Amici Curiae National Lesbian and Gay Law Ass'n et al., *Lawrence*, 539 U.S. at 558 (No. 02-102), *available at* 2003 WL 152348.

44. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ("[W]hat differentiates sex from nonsuspect statuses as intelligence and physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

45. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

46. *Id.* at 441. The *Cleburne* Court ultimately did not apply heightened scrutiny for a classification based on mental retardation, finding it "undeniable . . . that those who are mentally retarded have a reduced ability to cope with and function in the everyday world," and thus the legislature in other circumstances may have a rational basis to make such classifications. *Id.* at 442.

47. Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982).

48. *See Frontiero*, 411 U.S. at 684.

49. *See Cleburne*, 473 U.S. at 441; *Plyler*, 457 U.S. at 217 n.14; Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

50. United States v. Virginia, 518 U.S. 515, 531 (1996) (citing *Frontiero*, 411 U.S. at 684).

51. *Murgia*, 427 U.S. at 313.

52. *See infra* notes 53-62 and accompanying text.

for gender equality. Its proponents argued that an individual's lack of control over the characteristic made "using it to justify inferior treatment all the more invidious and unfair."[53] The Supreme Court accepted this argument because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth," adding that imposing "special disabilities upon [individuals] because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'"[54] Immutability of a characteristic alone, however, is not sufficient[55] and the lack of immutability, that is a behavioral aspect, is not dispositive if other factors for heightened scrutiny exist.[56] As one judge noted:

> It is clear that by "immutability" the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. . . . "[I]mmutability" may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them.[57]

It is, therefore, not the "immutability" of race or sex "that is the key to their suspectness, but the important role that these traits play in self-perception, group affiliation, and identification by others."[58]

Likewise, a group's lack of political power is also not dispositive.[59] The factor was first considered in the context of aliens with pending eligibility for citizenship because they lacked inroads to the political process.[60] The factor has subsequently been discounted because most

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53. Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & Pol'y 397, 403 (2001).

54. *Frontiero*, 411 U.S. at 686 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (holding it irrational to put a penalty on illegitimate children who were not responsible for their births)).

55. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

56. *See* Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977).

57. Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring); *see also* Roberts, *supra* note 42, at 501-07.

58. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev 1285, 1303 (1985). Though not directly addressing the issue of the suspect status of gays and lesbians, the Supreme Court in *Lawrence v. Texas, see infra* Part I.B.3, acknowledged that, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

59. *See infra* notes 60-62 and accompanying text.

60. *See* Foley v. Connelie, 435 U.S. 291, 294 (1978).

groups now accorded heightened scrutiny are not "politically powerless" in the sense that "they have no ability to attract the attention of the lawmakers."[61] Today, neither blacks nor women can claim to be politically powerless, yet both race and gender remain suspect classes meriting heightened scrutiny.[62]

### B. *Sexual Orientation Under Equal Protection*

Prior to the Supreme Court's 1996 decision in *Romer*,[63] the leading case regarding sexual orientation was the then ten-year-old *Bowers v. Hardwick*, which held that a statute criminalizing private, consensual sodomy did not violate the Due Process Clause.[64] Subsequently, courts attempted to apply the *Bowers* holding to claims of equal protection violations based on sexual orientation.[65]

#### 1. *Bowers v. Hardwick*[66] and Its Progeny

In *Bowers*, a gay man, respondent Hardwick, challenged the constitutionality of a Georgia statute that criminalized sodomy (regardless of the gender of the participants) after he was charged with its violation, though he was not ultimately prosecuted.[67] The *Bowers* Court, reversing the decision of the U.S. Court of Appeals for the Eleventh Circuit, found that there was no fundamental right to engage in homosexual sodomy as such a right was not "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it was] sacrificed.'"[68]

Based on this due process holding, subsequent cases found that homosexuals were not a suspect class for equal protection analysis and that classifications based on sexual orientation were permissible because they were based on conduct rather than orientation or status.[69] For example, in *Padula v. Webster*,[70] the D.C. Circuit noted, "[i]t would be quite anomalous . . . to declare status defined by

61. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445 (1985); *see, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 308 (2003) (applying strict scrutiny to law school's consideration of race in its application process); United States v. Virginia, 518 U.S. 515, 555 (1996) ("[A]ll gender-based classifications today warrant heightened scrutiny." (citation omitted)).

62. *See supra* note 61.

63. Romer v. Evans, 517 U.S. 620 (1996).

64. Bowers v. Hardwick, 478 U.S. 186 (1986).

65. *See infra* notes 69-87 and accompanying text.

66. 478 U.S. at 186.

67. *Id.* at 187-88.

68. *Id.* at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

69. *See, e.g.*, Thomasson v. Perry, 80 F.3d 915, 950-51 (4th Cir. 1996) (en banc); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

70. 822 F.2d at 97.

conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."[71] In distinguishing homosexuality from other traits, another court stated, "[m]embers of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature. . . . The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups."[72] All federal cases holding otherwise—that gay men and lesbians do constitute a suspect class—have been reversed or had their opinions withdrawn.[73]

Judge Norris of the Ninth Circuit authored a noteworthy concurrence in *Watkins v. United States Army*[74] that stands inapposite to the line of decisions refusing to treat homosexuals as a suspect class after *Bowers*.[75] Declining to apply *Bowers* to a claimed equal protection violation, Judge Norris would have affirmed the district court's finding that homosexuals in fact constitute a suspect class requiring the application of heightened scrutiny.[76] Judge Norris made the distinction between conduct and sexual orientation and limited *Bowers* to its due process holding, noting that "nothing in [*Bowers*] suggests that the state may penalize gays merely for their sexual orientation. . . . [T]he class of persons involved in [*Bowers*]—those who engage in homosexual sodomy—is not congruous with the class of persons targeted by [the classification]—those with a homosexual orientation."[77] He continued, "homosexuals do not become 'fair game' for discrimination simply because their sexual practices are not considered part of our mainstream traditions."[78] Moreover, he criticized the reasoning in *Padula* for relying on the "false premise that [*Bowers*] issues a blanket approval for discrimination against

71. *Id.* at 103; *see also Ben-Shalom*, 881 F.2d at 464 ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.")

72. *Woodward*, 871 F.2d at 1076 (internal citations omitted); *see also High Tech Gays*, 895 F.2d at 573 ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage . . . .").

73. *See, e.g.*, Watkins v. United States Army, 847 F.2d 1329, 1339 (9th Cir. 1988) (holding that sexual orientation is a suspect classification and thus deserves heightened scrutiny), *vacated and aff'd en banc on other grounds*, 875 F.2d 699 (9th Cir. 1989); Able v. United States, 968 F. Supp. 850, 864-65 (E.D.N.Y. 1997) (same), *rev'd*, 155 F.3d 628 (2d Cir. 1998); Jantz v. Muci, 759 F. Supp. 1543, 1551 (D. Kan. 1991) (same), *rev'd*, 976 F.2d 623 (10th Cir. 1992); High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1370 (N.D. Cal. 1987) (same), *rev'd*, 895 F.2d at 563.

74. 875 F.2d at 711-31 (Norris, J., concurring).

75. *See id.*

76. *See id.* at 728.

77. *Id.* at 716 (internal citation omitted).

78. *Id.* at 719.

homosexuals.... [*Bowers*] held only that the constitutionally protected right to privacy does not extend to homosexual sodomy. The case had nothing to do with equal protection."[79]

Judge Norris explored each of the factors for heightened scrutiny outlined above.[80] He noted that sexual orientation has "no relevance to a person's 'ability to perform or contribute to society'" and that such irrelevance suggests that sexual orientation classifications "reflect prejudice and inaccurate stereotypes."[81] He also recognized that "discrimination faced by homosexuals is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes."[82] Judge Norris continued by noting the flexibility of the immutability factor[83] and pondered "whether heterosexuals feel capable of changing *their* sexual orientation" and stated that requiring homosexuals to change a central aspect of their identity violates "the constitutional ideal of equal protection of the laws."[84]

Considering political powerlessness, Judge Norris wrote, "[t]he very fact that homosexuals have historically been underrepresented in and victimized by political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government."[85] He observed that "at the national level... homosexuals have been wholly unsuccessful in getting legislation passed that protects them from discrimination."[86] In conclusion, Judge Norris referenced the Supreme Court's decision in *Palmore v. Sidoti*, in which the Court "rejected the notion that private prejudice against minorities can ever justify official discrimination, even when those private prejudices create real and legitimate problems."[87]

### 2. *Romer v. Evans*[88]

In *Romer v. Evans*, a decade after its decision in *Bowers*, the Supreme Court, for the first time, addressed sexual orientation discrimination under the Equal Protection Clause, rather than the Due Process Clause.[89] In *Romer*, the Court invalidated Amendment 2 to the Colorado Constitution, which prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexuals and forbade the reinstatement of

79. *Id.* at 723.
80. *See supra* notes 43-62 and accompanying text.
81. *Watkins*, 875 F.2d at 725 (Norris, J., concurring).
82. *Id.* at 724. In fact, the defendant-Army conceded this point. *Id.*
83. *See supra* note 57 and accompanying text.
84. *Watkins*, 875 F.2d at 726 (Norris, J., concurring).
85. *Id.* at 727.
86. *Id.* at 727 n.30.
87. *Id.* at 729 (citing Palmore v. Sidoti, 466 U.S. 429 (1984)).
88. 517 U.S. 620 (1996).
89. *See id.*

such laws and policies.[90] Notably, *Romer* did not address the issue of whether homosexuals constitute a suspect or quasi-suspect class, as that issue was rejected by the trial court and not appealed.[91] Consequently, on its face, the Court applied only rational basis review in striking down the amendment.[92]

Colorado voters passed Amendment 2 by statewide referendum after a contentious campaign in response to ordinances passed by various Colorado municipalities including Aspen, Boulder, and Denver that banned discrimination by reason of sexual orientation in both public and private spheres of housing, employment, education, public accommodations, and health and welfare services.[93] The effect of the amendment was to "withdraw[] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies"[94] and it may be inferred that the amendment might also deprive gay men and lesbians even of laws and policies of general applicability that prohibit arbitrary discrimination.[95] The Court noted that the protections denied gay men and lesbians by Amendment 2 are those "taken for granted by most people either because they already have them or do not need them."[96]

The Court held that Amendment 2 violated equal protection because it imposed a "broad and undifferentiated disability on a single named group" and its great breadth was so far removed from any of the asserted governmental interests that the amendment "seems inexplicable by anything but animus toward the class it affects."[97] The Court wrote, "[i]f the constitutional conception of 'equal protection of

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90. *Id.* at 627.

91. *See* Evans v. Romer, 882 P.2d 1335, 1341 n.3 (Colo. 1994).

92. *See Romer*, 517 U.S. at 633 ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.").

93. *Id.* at 623-24. Amendment 2 stated the following:

> "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing."

*Id.* at 624 (citation omitted).

94. *Id.* at 627.

95. *Id.* at 630.

96. *Id.* at 631.

97. *Id.* at 632. The government had asserted "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality" as well as an interest in "conserving resources to fight discrimination against other groups" *Id.* at 635.

the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[98] The Court found Amendment 2 to be a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[99]

Justice Scalia wrote a vigorous dissent in *Romer* in which he asserted that Colorado had proffered the valid and legitimate interests of maintaining the associational rights of its citizens and preserving "traditional sexual mores against the efforts of a politically powerful minority" and thus, under rational basis review, Amendment 2 was constitutional.[100] Justice Scalia noted that the only "animus" present was "moral disapproval of homosexual conduct," which he found a permissible state interest under rational basis review.[101] He further relied on the reasoning of the *Bowers-Padula* line of cases, writing, "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[102]

A significant line of scholarly commentary supports the notion that, based on its decision in *Romer*, the Supreme Court may be on the verge of finding homosexuals to be a suspect class, should the question eventually present itself.[103] One such line of thinking draws a parallel between the Court's treatment of gender classifications through its initial use of rational basis review in *Reed v. Reed*[104] to its adoption of intermediate scrutiny for gender in *Frontiero v. Richardson*.[105] As in *Romer*, the *Reed* Court did not address the

98. *Id.* at 634-35 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

99. *Id.* at 635; *see also* Lewis, *supra* note 36, at 190-91 ("*Romer* stands for the broader proposition that anti-gay bias cannot be a legitimate motivation for legislation. That is, legislation cannot be motivated by pure 'animosity.'").

100. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

101. *Id.* at 644.

102. *Id.* at 641.

103. *See, e.g.*, Edward Stein, *Introducing* Lawrence v. Texas*: Some Background and a Glimpse of the Future*, 10 Cardozo Women's L.J. 263, 270 (2004) ("[S]ome scholars have proposed that *Romer* suggests that somewhat heightened scrutiny for sexual orientation is just around the corner."); Lewis, *supra* note 36, at 190 ("Some scholars have contended that although the *Romer* decision itself does not identify sexual orientation as a quasi-suspect class, it is the first step on the road towards that end."); *see also infra* notes 104-17 and accompanying text.

104. 404 U.S. 71 (1971).

105. 411 U.S. 677 (1973); Stein, *supra* note 103, at 269-70 (citing Pettinga, *supra* note 10, at 803 (encouraging the Court to use intermediate scrutiny in "rational basis with bite" situations)). In *Frontiero*, the Court invalidated a statutory provision requiring a woman in the uniformed services to demonstrate that her spouse was in fact dependent on her for over one half of his support in order to obtain benefits for that spouse though male service members received spousal benefits regardless of their spouse's dependence. *Frontiero*, 411 U.S. at 678-79. In so holding, the Court found classifications based on sex to be inherently suspect with implicit support for that

suspect class issue, but rather "provided no fact-based analysis that could have lent support to a future determination that a gender classification was, in fact, rationally related to a legitimate end."[106] Further, *Romer*, like *Reed*, summarily dismissed the government's asserted interests, here in protecting associational liberty, discouraging political factionalism, and prioritizing discrimination claims, and saw through those interests to find an underlying impermissible motivating factor for the classification.[107]

The *Romer* opinion is also notable for its acknowledgement of sexual orientation as a self-identifying trait and not just a means of categorizing a group associated with particular behavior or sexual conduct.[108] In his analysis of *Romer*, Professor Cass Sunstein wrote that "it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior. The state must justify discrimination on some other, public-regarding ground."[109] Polygamy, adultery, and fornication are punished for the harm stemming from such conduct while homosexuals are

> subject to a deeper kind of social antagonism, connected not only with their acts but also with their identity. It is this status feature that links discrimination on the basis of sexual orientation with discrimination on the basis of race or sex.... [Amendment 2 demonstrates] a desire to isolate and seal off members of a despised group whose characteristics are thought to be in some sense contaminating or corrosive.[110]

Sunstein connected the *Romer* outcome to that in *United States v. Virginia*, where the court found a military academy's exclusion of women unconstitutional,[111] in that both decisions embody "a ban on laws motivated by a desire to create second-class citizenship" or

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conclusion in *Reed v. Reed*. *Id.* at 682. The *Frontiero* Court described *Reed* as a justified departure from traditional rational basis analysis in that even in the face of a state interest "'not without some legitimacy,'" the classification was still the kind of "'arbitrary legislative choice'" forbidden by the Constitution. *Id.* at 684 (quoting *Reed*, 404 U.S. at 76).

106. Tobias Barrington Wolff, Case Note, *Principled Silence*, 106 Yale L.J. 247, 250 (1996).

107. *See id.* at 250-52.

108. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 6, 68 (1996). In an earlier article written shortly after the Ninth Circuit's initial decision in *Watkins*, *see supra* notes 74-87, and before that decision was later withdrawn, Professor Sunstein noted that the *Watkins* decision "provides reason to believe that constitutional protection against discrimination on the basis of sexual orientation will ultimately take place under the Equal Protection Clause," which, in contrast to the Due Process Clause, "is grounded in a norm of equality that operates largely as a critique of traditional practices." Sunstein, *supra* note 20, at 1179.

109. Sunstein, *supra* note 108, at 62.

110. *Id.*

111. United States v. Virginia, 518 U.S. 515, 539-40 (1996).

"animus."[112] Sunstein concluded that it must certainly "be unconstitutional to make 'homosexual status' a crime."[113]

Other commentators have linked the *Romer* decision to what has been termed the "pariah principle," arguing that "gays and lesbians are a group that cannot be relegated to outcast status."[114] These commentators contend that "[w]hether the badge of inferiority is a black skin, or a yellow star, or a pink triangle, the pariah principle forbids the government from relegating any class of citizens to the status of untouchables."[115] This theory relies heavily on, though does not require, evidence that homosexuality is an immutable trait.[116] The idea stems in part from Senator Jacob Howard who, in defending the proposed Fourteenth Amendment, stated that its purpose was to "'abolish all class legislation . . . and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another.'"[117]

### 3. *Lawrence v. Texas*[118]

Seven years after *Romer*, in *Lawrence v. Texas*, the Supreme Court addressed the same circumstances it had in *Bowers*.[119] Once again, it avoided the question of whether to apply heightened scrutiny to sexual orientation classifications, instead basing its holding on the Due Process Clause.[120] In *Lawrence*, the Court overruled its decision in *Bowers* and invalidated a Texas statute criminalizing same-sex sodomy based on a right to privacy that, under due process, extends to consensual intimate conduct between adults.[121] Though the Court

112. Sunstein, *supra* note 108, at 63.

113. *Id.* at 66 (citing Robinson v. California, 370 U.S. 660, 666 (1962) (holding unconstitutional a California law that made the status of narcotics addiction a crime)).

114. Lewis, *supra* note 36, at 192-94.

115. *Id.* at 194 (quoting Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 Const. Comment. 257, 275 (1996)); *see also* Eskridge & Hunter, *supra* note 2, at 280 ("[T]he Court ought not tolerate a law that marks a class as presumptive criminals and has so many discriminatory ramifications that it effectively creates an underclass of people outside the protections of the rule of law.").

116. Lewis, *supra* note 36, at 194. For a discussion of scientific evidence of the immutable nature of homosexuality and its use in equal protection litigation, see Symposium, *Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law*, 27 Fordham Urb. L.J. 279, 348-64 (1999); and Stephen Zamansky, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. Rev. 221, 241-44 (1993).

117. Lewis, *supra* note 36, at 195 (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

118. 539 U.S. 558 (2003).

119. *See supra* notes 67-68 and accompanying text.

120. *Lawrence*, 539 U.S. at 558. One notable difference between *Bowers* and *Lawrence* is that the Texas statute prohibited only same-sex sodomy while the Georgia statute prohibited the conduct across the board. *Id.* at 566.

121. *Id.* at 564, 578. The Court noted, "'[o]ur obligation is to define the liberty of all, not to mandate our own moral code.'" *Id.* at 571 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)).

declined to base its holding in the Equal Protection Clause,[122] it said such an argument was "tenable" and wrote, "[w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[123] The Court continued, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[124] The Court noted that the Fourteenth Amendment protects the "right to define one's own concept of existence," adding that personal choices so central to dignity and autonomy "could not define the attributes of personhood were they formed under compulsion of the State."[125] Without addressing any potential government interests to support the statute, the Court again used what it characterized as rational basis review to find that the statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[126]

Justice O'Connor, unlike her brethren in the majority, explicitly found that the Texas statute violated the Equal Protection Clause, rather than the Due Process Clause and, further, did so under an unambiguous use of rational basis with bite.[127] Justice O'Connor justified her use of "a more searching form of rational basis review" based on the statute's "desire to harm a politically unpopular group."[128] Echoing the sentiments of *Romer*, she wrote, "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[129] Citing Justice Harlan's famous dissent in *Plessy v. Ferguson*, in which he stated that the law "neither knows nor tolerates classes among citizens,"[130] O'Connor found that the law targeted not just conduct, but "gay persons as a class" with ramifications in an array of areas outside the criminal law.[131]

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122. For an analysis of the *Lawrence* Court's evasion of the equal protection claim, see Adrienne Butcher, Note, *Selective Constitutional Analysis in* Lawrence v. Texas*: An Exercise in Judicial Restraint or a Willingness to Reconsider Equal Protection Classification for Homosexuals?*, 41 Hous. L. Rev. 1407 (2004).

123. *Lawrence*, 539 U.S. at 574-75.

124. *Id.* at 575.

125. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

126. *Id.* at 578.

127. *See id.* at 584 (O'Connor, J., concurring).

128. *Id.* at 580.

129. *Id.* at 582 (citation omitted).

130. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

131. *Lawrence*, 539 U.S. at 583-84 (O'Connor, J., concurring). Justice O'Connor noted that, in Texas, calling someone a homosexual constituted slander per se and further that the law created a presumption of criminality for homosexuals resulting in legally sanctioned discrimination. *Id.*

Justice Scalia dissented, again finding majoritarian sexual morality to be a sufficient and legitimate government interest. He declared that the majority's opinion sounded the end of all moral legislation.[132] Refusing to make the distinction between conduct and sexual orientation, Scalia observed no equal protection problem, finding that the statute did not discriminate against men or women as a class, and applied equally to heterosexuals and homosexuals.[133] Further, he found the majority's failure to recognize the promotion of majoritarian sexual morality as a legitimate interest to be so "out of accord" with Supreme Court jurisprudence that it "require[d] little discussion."[134] Because Justice Scalia felt the statute implicated no suspect classification, or any classification for that matter, traditional rational basis review was applicable and satisfied by the Texas legislature's legitimate interest in curbing immoral and unacceptable forms of sexual behavior.[135]

## II. THE PROBLEMS AND INCONSISTENCIES OF POST-*ROMER* CASE LAW

The *Romer* and *Lawrence* decisions provide the backdrop for a host of decisions addressing sexual orientation classifications in the federal and state court systems since 1996. Ignoring the implications of these decisions, federal courts have continued to apply traditional rational basis review without examining whether the classification at issue may be based on animus or notions of majoritarian morality without a true legitimate governmental interest.[136] State courts, by contrast, have been more willing to apply rational basis with bite, often under the auspices of their respective state constitutions.[137] Less than a handful of jurisdictions have ventured that extra step to treat gay men and lesbians as a true suspect class and thus acknowledge their use of heightened scrutiny for sexual orientation classifications.[138] The legacy of *Romer* and *Lawrence* will lie in which of these interpretations ultimately prevails.

### A. *Maintaining Traditional Rational Basis Review*

Since *Romer*, the lower federal courts have heard numerous cases involving claims of sexual orientation discrimination, most often in the contexts of public employment or the dismissal of armed services

132. *Id.* at 599 (Scalia, J., dissenting).
133. *Id.* at 599-600.
134. *Id.* at 599.
135. *Id.* at 599-600.
136. *See infra* Part II.A.
137. *See infra* Part II.B.
138. *See infra* Part II.C.

personnel.[139] Regardless of their outcome, the decisions in these cases have relied heavily on rational basis review and the traditional deference courts are expected to give to any seemingly legitimate interest proffered by the relevant authority.[140] These cases can be divided into two groups, the separation of which appears to be determinative of their outcome: (1) "interest free" cases in which the relevant authority does not offer a legitimate interest for the discrimination, the relevant authority claims no discrimination took place, or the classification is found to have been based solely on animus leading to a finding of an equal protection violation;[141] and (2) "interest asserted" cases in which the relevant authority asserts a governmental interest for the discrimination leading to a finding of no violation.[142] Lacking clear guidance as to the applicability of rational basis with bite, both the interest free and interest asserted cases rely exclusively on traditional rational basis review.[143]

### 1. "Interest Free" Cases

The first of the "interest free" cases, *Nabozny v. Podlesny*, involved a student that was repeatedly assaulted based on his sexual orientation while the defendant school district failed to respond appropriately or, in some instances, at all.[144] Though the *Romer* opinion had already been issued at the time of this decision, the Seventh Circuit chose not to directly rely on it in order to avoid qualified immunity analysis complications that might have precluded its application to the defendants because their discriminatory actions occurred before the *Romer* opinion had been issued.[145] Still, relying on the well-established rule of *Yick Wo v. Hopkins*, that if a law is applied by a public authority unequally between persons similarly situated, "the denial of equal justice is still within the prohibition of the Constitution,"[146] the Court held that it was "unable to garner any rational basis for permitting one student to assault another based on

139. *See, e.g.*, Able v. United States, 155 F.3d 628 (2d Cir. 1998); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347 (E.D.N.Y. 1999); Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

140. *See infra* Parts II.A.1-II.A.2.

141. *See infra* Part II.A.1.

142. *See infra* Part II.A.2. For purposes of this discussion, this distinction assumes that the plaintiff has sufficiently demonstrated that he or she has suffered intentional and purposeful discrimination because of his or her sexual orientation. *See, e.g.*, Nabozny, 92 F.3d at 453-54.

143. *See infra* Parts II.A.1-2.

144. *See Nebozny*, 92 F.3d at 446.

145. *Id.* at 458 n.12. By not relying on *Romer*, the court obviated a possible appeal on the grounds that the defendants were not sufficiently on notice that their conduct might have violated equal protection under the Supreme Court's opinion in *Romer* which was issued after oral argument in *Nabozny*. *See id.*

146. *Id.* at 458 (citing Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886)).

the victim's sexual orientation and the defendants do not offer us one."[147]

In *Stemler v. City of Florence*, the Sixth Circuit also cited the principle in *Yick Wo* in finding that selective prosecution by a police officer based on perceived sexual orientation violated equal protection.[148] In this case, defendant police officers arrested Stemler for driving under the influence "out of a desire to effectuate an animus against homosexuals" because they perceived her to be a lesbian, though, in fact, she was not.[149] Further, these officers failed to arrest a similarly situated heterosexual male at the scene who had also been driving under the influence.[150] Echoing *Romer*, the court found that since a "desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause."[151] Notably, the court held that *Romer*, though applicable, was not necessary to its holding as the Supreme Court had already held that a bare desire to harm a politically unpopular group was an impermissible motive in *United States Department of Agriculture v. Moreno*.[152]

In 1998, two district court cases also found equal protection violations in the context of rehiring gay teachers.[153] In an Ohio case, the district court found that a school district board had discriminated against a gay teacher based on his sexual orientation when it failed to renew his teaching contract, yet retained the services of a less qualified heterosexual teacher who was similarly up for renewal.[154] The court noted that "the defendants did not present any evidence at trial to support a legitimate rationale for discriminating against homosexual teachers."[155] A Utah case involved a similar violation when a school district failed to renew a public school teacher's coaching position based on her sexual orientation.[156] The court wrote, "[i]f the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity, it is necessarily irrational and under *Romer*, . . . it provides no legitimate support."[157] The court observed that the record contained no job-related reasons for not reassigning the plaintiff to her coaching

147. *Id.*
148. *See* Stemler v. City of Florence, 126 F.3d 856, 873-74 (6th Cir. 1997).
149. *Id.* at 873.
150. *Id.*
151. *Id.* at 874.
152. *Id.* (discussing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)).
153. *See infra* notes 154-59 and accompanying text.
154. Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160, 1172 (S.D. Ohio 1998).
155. *Id.* at 1174.
156. *See* Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998).
157. *Id.* at 1289.

position or how her sexual orientation bore any relevance to her competency as a coach.[158] Recalling the Supreme Court's decision in *Palmore v. Sidoti*, the court continued, "the private antipathy of some members of a community cannot validate state discrimination."[159]

Two district courts in the Second Circuit similarly disposed of two other "interest free" cases.[160] In *Quinn v. Nassau County Police Department*,[161] a police officer brought an equal protection claim based on the systematic abuse and harassment he suffered at the hands of his fellow officers, conduct which his supervisors condoned or ignored.[162] The court found that a "hostile work environment directed against homosexuals based on their sexual orientation constitute[s] an Equal Protection violation,"[163] and that "[s]uch harassment . . . cannot survive a rational basis review when it is motivated by irrational fear and prejudice towards homosexuals."[164] In *Zavatsky v. Anderson*,[165] the plaintiff brought an equal protection claim after the Connecticut Department of Child and Family Services deprived her of her right to visit her partner's son, and participate in planning related to his care, thereby ignoring their well-documented familial relationship in contravention of the agency's own policies.[166] The court, noting that sexual orientation classifications are only entitled to rational basis review,[167] found that the plaintiff sufficiently stated a claim for an equal protection violation since the defendants had no rational basis for their classification of the plaintiff on the basis of her sexual orientation.[168]

In 2004, the Fifth Circuit considered an "interest free" case, in which a prison inmate alleged that prison officials failed to adequately protect him from sexual assaults based on anti-gay animus[169] while the defendants alleged their actions were motivated by a "status-neutral determination."[170] The court, citing *Romer*, held that "a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims."[171] In holding for the inmate, the court was ultimately swayed

158. *Id.*
159. *Id.*
160. *See infra* notes 161-68 and accompanying text.
161. 53 F. Supp. 2d 347 (E.D.N.Y. 1999).
162. *Id.* at 357-58.
163. *Id.* at 357.
164. *Id.* at 358.
165. 130 F. Supp. 2d 349 (D. Conn. 2001).
166. *Id.* at 351-52.
167. *Id.* at 356.
168. *Id.* at 358.
169. Johnson v. Johnson, 385 F.3d 503, 514 (5th Cir. 2004); *see also* Adam Liptak, *Ex-Inmate's Suit Offers View into Sexual Slavery in Prisons*, N.Y. Times, Oct. 16, 2004, at A1.
170. *Johnson*, 385 F.3d at 532.
171. *Id.*

by the state's lack of any legitimate aim or interest for its disparate treatment of the plaintiff.[172]

### 2. "Interest Asserted" Cases

In contrast to the "interest free" cases discussed above, each of the "interest asserted" cases described below involves courts' findings that the classification in question satisfies traditional rational basis review because the government has proffered an interest rationally related to a legitimate governmental objective.[173] Two courts, for example, found a rational basis to discriminate against homosexuals in cases challenging the military's "don't ask, don't tell" policy.[174] In *Philips v. Perry*, the Ninth Circuit, using rational basis review, concluded that "maintaining effective armed forces is indisputably a compelling governmental purpose and that the policy of excluding from the military those members who engage in homosexual conduct is rationally related to this purpose . . . 'in light of the special

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172. *Id.* at 532-33 ("The defendants have not attempted to argue that according homosexuals less protection than other inmates would advance any legitimate aim.").

173. *See infra* notes 174-211 and accompanying text.

174. *See* Able v. United States, 155 F.3d 628 (2d Cir. 1998); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997). The "don't ask, don't tell" policy provides for a service member's separation from the armed services if he or she has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, . . . unless . . . the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) has "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b)(1)-(3) (2000). The statute defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." *Id.* § 654(f)(3). The Department of Defense Directive which implements the statute provides that

> [a] statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct . . . .

Dep't of Def., Department of Defense Directive 1332.14(E3.A1.1.8.1.1.), Dec. 21, 1993, *available at*, http://www.dtic.mil/whs/directives/corres/pdf/d133214wch1_122193/d133214p.pdf. In its legislative findings, Congress found that "[t]he armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability" and that the presence of "persons who demonstrate a propensity or intent to engage in homosexual acts" would create such an unacceptable risk. 10 U.S.C. § 654(a)(14)-(15).

circumstances and needs of the armed forces.'"[175] The court, finding the policy was based on conduct rather than status, accepted the Navy's explanation that separating members who engage in homosexual conduct was necessary to maintain military effectiveness, "by maintaining unit cohesion, accommodating personal privacy and reducing sexual tension."[176]

In *Able v. United States*, other armed service members challenged the "don't ask, don't tell" policy.[177] In upholding the policy and explaining its departure from *Romer*'s line of analysis, the Second Circuit explicitly noted that *Romer*, *Cleburne,* and *Palmore* used analyses that "differed from traditional rational basis review because [they] forced the government to justify its discrimination," stating that "the Court did not simply defer to the government; it scrutinized the justifications offered by the government to determine whether they were rational."[178] The *Able* court conceded that government action motivated by "irrational fear and prejudice toward homosexuals" could not survive rational basis review in a civil setting, but ultimately held that the government had a legitimate interest in discriminating against homosexuals due to the uniqueness of the military setting and the deference accorded to military decisions.[179] Consequently, because of the deference accorded the armed forces in its self-regulation, the "don't ask, don't tell" policy was rationally related to legitimate governmental interests.[180]

In contrast to its decision in *Nabozny*, finding an equal protection violation where a school district failed to curb the sexual orientation discrimination of a student,[181] in *Schroeder v. Hamilton School District*,[182] the Seventh Circuit found that harassment of a teacher by students, parents, and staff due to his sexual orientation did not constitute such a violation.[183] The harassment in *Schroeder* included accusations that the plaintiff had AIDS, frequent obscenities and catcalls, and harassing phone calls, many of which were anonymous.[184]

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175. *Philips*, 106 F.3d at 1425-26 (quoting Beller v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980)).

176. *Id.* at 1429. Notably, the majority opinion did not mention *Romer* anywhere in its analysis. *See id.* at 1421-32 (failing to discuss *Romer* in upholding the "don't ask, don't tell" policy).

177. *Able*, 155 F.3d at 628; *see supra* note 174.

178. *Able*, 155 F.3d at 634. It should be noted that in deciding *Palmore*, the Court in fact applied strict scrutiny due to the presence of a classification based on race. *See* Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984).

179. *Able*, 155 F.3d at 634-35; *cf.* Veney v. Wyche, 293 F.3d 726, 732-34 (4th Cir. 2002) (finding legitimate penological interest under rational basis review in segregation of homosexual male inmates for reasons of prohibiting sexual activity and avoiding potential friction and violence among the prison population).

180. *Able*, 155 F.3d at 634.

181. *See supra* notes 144-47 and accompanying text.

182. 282 F.3d 946 (7th Cir. 2002).

183. *See id.* at 950-51.

184. *Id.* at 948-49.

In response, the school district offered a general instruction to teachers to discipline those students who used inappropriate language or behavior.[185] The court cited the limited resources of public schools, the school's prerogative to prioritize use of those resources to obviate other types of prejudice, and finally that "the well-being of students, not teachers, must be the primary concern of school administrators" as justifications for the school's failure to address the plaintiff's complaints.[186] The court deferred to the school district, writing, "[i]n the absence of deliberate indifference, federal judges should not use rational basis review as a mechanism to impose their own social values on public school administrators who already have innumerable challenges to face."[187]

a. *Rational Basis Review After Remand*

Two cases in particular exemplify how reluctant lower courts may be to apply rational basis with bite in the context of sexual orientation and equal protection: *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,[188] which was remanded for reconsideration to the Sixth Circuit by the Supreme Court in light of its just-rendered *Romer* decision;[189] and *State v. Limon*,[190] which was similarly remanded by the Supreme Court to the Court of Appeals of Kansas in light of the Supreme Court's just-rendered decision in *Lawrence*.[191]

In *Equality Foundation*, the Sixth Circuit, using rational basis review, upheld the constitutionality of Article XII, an amendment to the Cincinnati city charter passed by referendum[192] that prospectively prohibited and eliminated any existing anti-discrimination protections for lesbians, gay men, and bisexuals.[193] The court determined that

185. *Id.* at 949.

186. *Id.* at 952. Though not used to directly support the classification, the court also remarked, "there is no simple way of explaining to young students why it is wrong to mock homosexuals without discussing the underlying lifestyle or sexual behavior associated with such a designation." *Id.* at 954.

187. *Id.* at 956. Concurring, Judge Posner agreed with the majority but wrote separately to emphasize that "[h]omosexuals have not been accorded the constitutional status of blacks or women" and consequently face a higher burden of demonstrating that the alleged withdrawal of state protection was completely "irrational" or "motivated by baseless hostility." *Id.* at 957 (Posner, J., concurring).

188. 128 F.3d 289 (6th Cir. 1997).

189. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001 (1996).

190. 83 P.3d 229 (Kan. Ct. App. 2004), *review granted*, No. 00-85898-AS, 2004 Kan. LEXIS 284 (Kan. May 25, 2004). One scholar has described this case as "more likely to push the equal protection argument applied to sexual orientation." *See* Stein, *supra* note 103, at 285.

191. Limon v. Kansas, 539 U.S. 955 (2003).

192. *Equal. Found.*, 128 F.3d at 301.

193. *Id.* at 291. Article XII stated the following:

*NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.*

*Bowers* and its progeny prohibited the treatment of homosexuals as a suspect or quasi-suspect class.[194] The court observed that Article XII "satisfied minimal constitutional requirements" because it advanced valid community interests, "including enhanced associational liberty for its citizenry, conservation of public resources, and augmentation of individual autonomy imbedded in personal conscience and morality."[195] The court ultimately rested its holding on the Cincinnati electorate's interest in conserving public and private financial resources and thus the court did not need to discuss the "equally justifiable community interests" of associational liberty and community moral disapproval of homosexuality.[196] Even so, according to the court, *Romer* did not reject associational liberty and moral disapproval of homosexuality as legitimate interests, but rather concluded, "under the facts and circumstances of *Romer*, the state's argument in support of Colorado Amendment 2 was not credible."[197]

The court distinguished Article XII from Colorado's Amendment 2 at issue in *Romer* by noting that Article XII applied only to the lowest level of government and that its language did not deprive homosexuals of all legal protections under municipal law, but only eliminated "special class status" and "preferential treatment."[198] Laws

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> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

*Id.*

194. *Id.* at 292-93. The court added, "[t]he party challenging the rationality of legislation bears the burden of negating every conceivable basis for that enactment, regardless of whether or not such supporting rationale was cited by, or actually relied upon by, the promulgating authority." *Id.* at 293 n.4 (citing FCC v. Beach Communications, Inc., 508 U.S. 307, 313-15 (1993)).

195. *Id.* at 293-94. For an argument supporting the Sixth Circuit's use of majoritarian morality as a legitimate interest, see Robert F. Bodi, Note, *Democracy at Work: The Sixth Circuit Upholds the Right of the People of Cincinnati to Choose Their Own Morality in* Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, *128 F.3d 289 (6th Cir. 1997)*, 32 Akron L. Rev. 667, 670 (1999) ("[C]ourts should abandon their elitist usurpation of democracy and allow the popular will to determine the role of morality in the governance of a city, the political unit closest to the people themselves."). On November 2, 2004, Cincinnati voters repealed this amendment by a 54-46 percent margin. Kate Zernike, *Groups Vow Not to Let Losses Dash Gay Rights*, N.Y. Times, Nov. 14, 2004, at A30; Christopher Curtis, Cincinnati Voters Repeal Anti-Gay Law (Nov. 3, 2004), *at* http://www.planetout.com/news/article.html?2004/11/03/5.

196. *Equal. Found.*, 128 F.3d at 301.

197. *Id.* at 300-01.

198. *Id.* at 296-97. The *Romer* Court rejected a similar interpretation of Amendment 2. *See* Romer v. Evans, 517 U.S. 620, 626 (1996). For further comparison of *Romer* and *Equality*, see *infra* text accompanying notes 308-17.

of general applicability would still apply to gay men and lesbians as they do all citizens.[199] In the absence of an infringement on a fundamental right or the presence of a suspect or quasi-suspect class, the court found the statute presumptively valid and "entitled to the highest degree of deference from the courts."[200]

In *Limon*, the plaintiff alleged that limiting the applicability of a Kansas statute to opposite sex partners ran afoul of the Equal Protection Clause because it punished consensual heterosexual sodomy with a minor less severely than consensual homosexual sodomy with a minor.[201] Plaintiff Limon, a minor himself, was sentenced to 206 months imprisonment (over seventeen years) followed by sixty months of supervised release,[202] while a heterosexual with Limon's previous adjudications would have received thirteen to fifteen months with presumptive probation for the same conduct under the "Romeo and Juliet" exception governing consensual sexual activity between minors of the opposite sex.[203] Outlining its rational basis review, the court noted that a law is presumed constitutional even if it results in some inequality[204] and further that equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[205] Applying this review, the court found that "the legislature could have reasonably determined that . . . [the statute] would encourage and preserve the traditional sexual mores of society."[206] The court cited protecting and advancing the family as a legitimate purpose behind the distinction because same-sex sexual acts do not lead to procreation.[207] Though the case was remanded for reconsideration in light of *Lawrence*, the court distinguished *Lawrence* on the grounds that *Lawrence* rested on the Due Process Clause and was thus inapplicable to Limon's equal protection claim.[208]

The concurring judge in *Limon* did not ascribe to the same legitimate interests as the majority opinion, but still found that an "intention to protect children from increased health risks associated with homosexual activity until they are old enough to be more certain of their choice," though concededly "tenuous," was a sufficient

199. *Equal. Found.*, 128 F.3d at 297.
200. *Id.*
201. State v. Limon, 83 P.3d 229, 232 (Kan. Ct. App. 2004), *review granted*, No. 00-85898-AS, 2004 Kan. LEXIS 284 (Kan. May 25, 2004).
202. *Id.*
203. *Id.* at 243 (Pierron, J., dissenting). Even criminal (adult) sodomy had a sentencing range of only 55 to 61 months with presumptive imprisonment. *Id.*; *see also* Eskridge & Hunter, *supra* note 2, at 282-83.
204. *Limon*, 83 P.3d at 233 (citing McGowan v. Maryland, 366 U.S. 420, 425-26 (1961)).
205. *Id.* (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)).
206. *Id.* at 236.
207. *Id.* at 237.
208. *Id.* at 235.

justification for the classification.[209] The concurrence found that the distinction between equal protection and due process "controls the outcome of this case," leaving the court to determine the equal protection question of "whether a rational basis exists to treat homosexual activity with a child differently from heterosexual activity with a child," rather than the due process question of the appropriate level of punishment for sexual conduct between minors generally.[210] The concurrence, as stated above, agreed there was such a rational basis, even if only a tenuous one.[211]

### B. *Following* Romer*'s Lead: Applying Rational Basis with Bite*

The Supreme Court has never directly ruled on whether homosexuals constitute a suspect class deserving of some form of heightened scrutiny for equal protection analysis: the issue of the possible suspect class status of gay men and lesbians was explicitly not before the court in *Romer*, and *Lawrence* relied on the Due Process Clause.[212] Twenty years ago, Justice Brennan, dissenting from a denial of a writ of certiorari, opined that "discrimination against homosexuals . . . raises significant constitutional questions under both prongs of our settled equal protection analysis,"[213] noting that homosexuals were a "significant and insular minority,"[214] were relatively powerless in the political arena, and have historically faced discrimination that may reflect deep-seated prejudice rather than rationality.[215] Consequently, "[s]tate action taken against members of such [a] group[] based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court."[216]

Though neither *Romer* nor *Lawrence* implemented Justice Brennan's views, the decisions demonstrate a more searching or meaningful form of rational basis review—or rational basis with bite in application if not in name—by directly addressing the legitimate interests proffered by the government and assessing whether those interests are rationally related to the classification in question.[217] As

209. *Id.* at 242 (Malone, J., concurring).
210. *Id.* at 241.
211. *See supra* note 209 and accompanying text.
212. *See supra* Parts I.B.2-3; *see also* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1015-16 (1985) (Brennan, J., dissenting from denial of certiorari).
213. *Rowland*, 470 U.S. at 1014.
214. *Id.*
215. *Id.*
216. *Id.*
217. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 458 (1985) (Marshall, J., dissenting) ("To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must . . . be called 'second order' rational-basis review."); Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998); Pettinga, *supra* note 10, *passim*.

discussed above, federal courts have thus far been unwilling to embrace this type of review, leaving it to a small number of dissenting opinions to invoke the rational basis with bite approach.[218] Not facing the same constitutional restrictions as federal courts, state courts have been more willing to deviate from the traditional tiered framework by employing rational basis with bite.[219]

1. Biting Dissents: Rational Basis with Bite in Federal Court

Though the lower federal courts have shown their reluctance to stray from rational basis review, some dissenting opinions in the "interest asserted" cases have more directly invoked the "bite" indicated in *Romer* by more closely scrutinizing the relationship of the government's asserted interests with the sexual orientation classifications at issue.[220]

For example, Judge Fletcher, dissenting in *Philips v. Perry*, concluded that "the military's ['don't ask, don't tell'] policy of differentiating between the private sexual activities of its heterosexual and homosexual service members [was] not rationally related to a legitimate government interest."[221] Judge Fletcher reasoned that "unit cohesion," though a legitimate interest, was not furthered by the policy in a "rational and reasonably related way"[222] because the government acknowledged that gay and lesbian service members are equally able to perform their duties and contribute to the unit, and an interest in unit cohesion was not legitimate if based on private biases.[223] Similarly, Judge Wood, dissenting in *Schroeder v. Hamilton School District*, found the school district's failure to respond to the plaintiff-teacher's complaints of harassment lacked a rational relationship to the government's asserted reason of prioritizing limited resources.[224] She added, "[n]othing in *Romer* justifies a system under which a state or state actors . . . deliberately either omit altogether or give a diminished form of legal protection from verbal or

218. *See infra* Part II.B.1.

219. *See infra* Part II.B.2.

220. *See, e.g.*, Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 959 (7th Cir. 2002) (Wood, J., dissenting); Philips v. Perry, 106 F.3d 1420, 1436 (9th Cir. 1997) (Fletcher, J., dissenting); *see also supra* notes 174-76, 182-87 and accompanying text.

221. *Philips*, 106 F.3d at 1432 (Fletcher, J., dissenting).

222. *Id.* at 1435.

223. *Id.* at 1435-36. Judge Fletcher also wrote, "[d]isapproval of homosexuality on the part of heterosexual service members is an impermissible reason for discriminating against gay service members." *Id.* at 1436 (citing Romer v. Evans, 517 U.S. 620, 634-35 (1996)).

224. *Schroeder*, 282 F.3d at 961 (Wood, J., dissenting). Judge Wood derisively appended, "[a]dding two words, 'sexual orientation,' to the memorandum that was circulated could hardly have added a second to the secretarial time involved, nor could it have added appreciably to the amount of toner consumed by the photocopying machine." *Id.*

physical assaults to individuals in certain disfavored classes."[225] Judge Wood further noted that the school district "never" attempted to dissuade students, parents, or others in the community from actions that may be considered sexual harassment discrimination or indicated that such conduct would not be tolerated.[226]

### 2. Rational Basis with Bite in State Courts

Some state courts, on the other hand, have declined to adopt the federal courts' comparatively strict deference to any potentially legitimate governmental interests when presented with sexual orientation classifications.[227] These courts have followed *Romer*'s lead by closely scrutinizing government-asserted interests while maintaining that they are exercising rational basis review.[228] Specifically, the Vermont and Massachusetts state courts have applied rational basis with bite in two seminal cases regarding the right of gay men and lesbians to marry, in significant part due to the greater flexibility and security of their respective state constitutions.[229]

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225. *Id.*
226. *Id.*
227. *See infra* Parts II.B.2.a-b.
228. *See infra* Part II.B.2.c.
229. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. State, 744 A.2d 864 (Vt. 1999). Other jurisdictions have also dealt with the right of gay men and lesbians to marry at some level, including Alaska, Arizona, California, Hawaii, New Jersey, New York, and Washington, D.C. These cases have reached different conclusions based on different grounds—often due process or other idiosyncrasies of their respective state constitutions—but none have used heightened scrutiny based on sexual orientation. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *4-6 (Alaska Super. Ct. Feb. 27, 1998) (holding the choice of one's life partner to be a fundamental right stemming from the fundamental rights to marry and privacy) (superseded by amendment to state constitution); Standhardt v. Superior Court, 77 P.3d 451, 462-64 (Ariz. Ct. App. 2003) (noting that petitioners did not argue that homosexuals are a quasi-suspect or suspect class, and denying application of strict scrutiny because homosexuals do not have a fundamental right to marry); Woo/Martin v. State et al. ("Marriage Cases"), No. 4365, 2005 WL 583129, at *1 (Cal. Super. Ct. Mar. 14, 2005) (using rational basis with bite as to sexual orientation and strict scrutiny as to gender under the equal protection provision of the California Constitution to find the statutory limitation of marriage to one man and one woman unconstitutional); Dean v. District of Columbia, 653 A.2d 307, 331 (D.C. 1995) (concluding that same-sex marriage was not a fundamental right deeply rooted in our nation's history and thus not protected by the Due Process Clause); Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (holding that sex is a "suspect category" for purposes of equal protection analysis under the Hawaii Constitution and that HRS § 572-1—limiting marriage to opposite-gender partners—is subject to strict scrutiny) (superseded by amendment to state constitution); Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114, at *23 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (unpublished) (holding that "the State has articulated more than adequate reasons to support the public need for [restricting marriage to one man and one woman]" under New Jersey's State Constitution); Hernandez v. Robles, No. 103434/2004, 2005 WL 363778, at *1 (N.Y. Sup. Ct. Feb. 4, 2005) (concluding that the fundamental right to marry extends to gay men and lesbians under the New York Constitution).

### a. Baker v. State[230]

In *Baker v. State*, the Vermont Supreme Court framed its decision in the Vermont Constitution's common benefits clause[231] rather than the Fourteenth Amendment of the Federal Constitution.[232] The court veered from the multi-tiered analysis of current federal jurisprudence and used an approach "broadly deferential to the legislative prerogative to define and advance governmental *ends*, while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective."[233] The court said that state precedent under the Vermont Constitution required "a 'more stringent' reasonableness inquiry than was generally associated with rational basis review under the federal constitution."[234] To eliminate any doubt that the court was applying rational basis with bite, the court cited as support for its deviation from traditional rational basis an article by Professor Cass Sunstein that pointed to federal examples, including *Romer* and *Cleburne*, in which the Supreme Court itself made such deviations.[235]

### b. Goodridge v. Department of Public Health[236]

Similarly, in *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court acknowledged that the Massachusetts Constitution is "more protective of individual liberty

230. 744 A.2d 864 (Vt. 1999).

231. The common benefits clause of the Vermont Constitution reads, in pertinent part, "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." Vt. Const., ch. I, art. 7.

232. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.").

233. *Baker*, 744 A.2d at 871.

234. *Id.* (internal citations omitted).

235. *Id.* at 872 n.5 (citing Sunstein, *supra* note 108, at 59-61). In this article, Professor Sunstein examined what he denoted as the "*Moreno-Cleburne-Romer*" trilogy and concluded that in each of these three cases, the Supreme Court deviated from traditional rational basis review despite the presence of "poorly fitting but probably rational justifications," because the classifications in question were more likely reflective of "animus" or a bare desire to harm an unpopular, disliked, or feared group than the respective interests asserted in those cases. Sunstein, *supra* note 108, at 61-62. Sunstein argued that this trilogy represented "decisional minimalism" in its failure to articulate a new tier of judicial scrutiny and use of rational basis review as a "magical trump card" to "invalidate badly motivated laws." *Id.* at 61. Noting the unique nature of the *Romer* analysis, another scholar noted that "*Romer*'s reasoning is multidimensional, not linear, in the way that it alters the logic of equal protection analysis." Nan D. Hunter, *Proportional Equality: Readings of* Romer, 89 Ky. L.J. 885, 895 (2001).

236. 798 N.E.2d 941 (Mass. 2003).

and equality than the Federal Constitution"[237] and, like the *Lawrence* Court, focused its attention on the due process claim rather than the equal protection claim, since a ruling grounded in due process will advance and incorporate the interests of equal protection.[238] For due process claims under Massachusetts law, the court wrote, "rational basis analysis requires that statutes 'bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare,'"[239] a standard consistent with rational basis with bite.[240]

### c. *Review of the Government's Asserted Interests in* Baker *and* Goodridge

After determining the appropriate level of review, both the *Baker* and *Goodridge* courts analyzed each of the governments' proffered interests to find a rational relationship to limiting marriage to heterosexual couples.[241] The *Baker* court found that denying same-sex couples the right to marry for the purpose of furthering the link between procreation and child-rearing was under-inclusive, given that many heterosexual couples who marry cannot or choose not to have children.[242] The *Goodridge* court agreed on this point, writing, "[t]he 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage"[243] and

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237. *Id.* at 948. Article I of the Massachusetts Constitution reads:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Mass. Const. Pt. 1, art. I. In relevant part, Article VI provides, "[n]o man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public." Mass. Const. Pt. 1, art. VI.

238. *Goodridge*, 798 N.E.2d at 953 (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)). Though the court's analysis primarily focused on due process, the court did find, unlike the *Lawrence* Court, that the restriction on marriage did not meet rational basis review for equal protection, as well as due process under the Massachusetts Constitution. *Id.* at 961. As in *Romer*, the court did not consider whether strict scrutiny was applicable based on the possibility of suspect status for sexual orientation classifications, since the statute in question did not survive even rational basis review. *See id.*

239. *Id.* at 960 (citation omitted).

240. *See id.*

241. *See infra* notes 242-55 and accompanying text.

242. Baker v. State, 744 A.2d 864, 881 (Vt. 1999).

243. *Goodridge*, 798 N.E.2d at 962.

thus like Amendment 2 in *Romer* "impermissibly 'identifies persons by a single trait and denies them protection across the board.'"[244]

The *Baker* court also found the purpose of legitimizing children and providing for their security through civil marriage limited to heterosexuals to be counterproductive, given that many same-sex couples raise children equally deserving of such protections.[245] Similarly, in dismissing what the Massachusetts government called an interest in "protecting the 'optimal' child rearing unit,"[246] the *Goodridge* court acknowledged the "changing realities of the American family,"[247] that family composition was not relevant to successful child-rearing and, further, that "the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."[248]

The *Baker* court similarly dismissed as unreasonable and wholly speculative Vermont's claims that same-sex unions would encourage marriages of convenience and otherwise unpredictably affect the institution of marriage.[249] Although, in *Goodridge*, Massachusetts did not raise these arguments, it did assert that limiting marriage conserves scarce state and financial resources because, it alleged, same-sex couples are less financially dependent on each other.[250] This interest was also rejected, because the *Goodridge* court found that such economic concerns had no rational relationship to excluding same-sex couples, since the existing marriage laws "do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence" as such benefits are provided regardless of a couple's financial arrangements.[251]

After assessing each of the government's asserted interests, the *Baker* court concluded that the State had failed to provide a "reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law."[252] The *Goodridge* court went a step further in an echo of the Supreme Court's reasoning in *Romer*, acknowledging in essence

244. *Id.* (citing Romer v. Evans, 517 U.S. 620, 633 (1996)). The court further noted, "the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite sex-relationships and are not worthy of respect." *Id.*

245. *Baker*, 744 A.2d at 882.

246. *Goodridge*, 798 N.E.2d at 963.

247. *Id.* (quoting Troxel v. Granville, 530 U.S. 57, 64 (2000)).

248. *Id.*

249. *Baker*, 744 A.2d at 885. The court acknowledged that the State's concern may be a plausible forecast of what is to come, but such may not serve as a reasonable basis for the statutory exclusion. *Id.* Even if the State was able to provide empirical proof to support its concerns, the court found this argument failed, not because of lack of proof, but "failure of logic." *Id.* at 885 n.14.

250. *Goodridge*, 798 N.E.2d at 964.

251. *Id.*

252. *Baker*, 744 A.2d at 886.

that, in assessing each of the State's asserted interests, it had engaged in pretext review:

> The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[253]

Though ruling under the auspices of their respective and concededly broader state constitutions, the *Baker* and *Goodridge* courts, in their thorough assessment of the government's asserted interests and unwillingness to blindly defer, unlike the "interest asserted" federal cases,[254] align more closely with the *Romer* and *Lawrence* opinions by advocating the use of rational basis with bite for sexual orientation classifications.[255]

### C. *An Alternative: Acknowledging Use of Heightened Scrutiny*

A few select opinions have challenged the use of rational basis with bite—not in favor of traditional deferential review, but in favor of acknowledging the appropriateness of applying heightened scrutiny to sexual orientation classifications, and criticizing those who employ rational basis with bite for failing to acknowledge their departure from traditional rational basis review.[256]

#### 1. Judge Dooley's Concurrence in *Baker v. State*

Concurring in *Baker v. State*, Judge Dooley challenged the majority's application of any form of rational basis review and insisted that "the rationale in federal decisions for withholding a more searching scrutiny does not apply in Vermont."[257] He distinguished

253. *Goodridge*, 798 N.E.2d at 968 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (footnote omitted)).

254. *See supra* Part II.A.2.

255. *See supra* notes 241-51 and accompanying text.

256. *See infra* Parts II.C.1-2.

257. *Baker*, 744 A.2d at 891 (Dooley, J., concurring); *see also* Eskridge & Hunter, *supra* note 2, at 291 (noting Judge Dooley's objection to the *Baker* court's application of rational basis with bite). In his concurrence in *Goodridge*, Judge Greaney also found heightened scrutiny appropriate on the grounds that the restriction on marriage amounted to both an infringement on a fundamental right and a sex-based (as opposed to a sexual orientation-based) classification. *See Goodridge*, 798 N.E.2d at 972-73 (Greaney, J., concurring). Both the due process claim that marriage is a fundamental right and the proposition that a sexual orientation classification may be held invalid as a sex-based classification are outside the scope of this Note. For a discussion on marriage as a fundamental right, see generally The Ass'n of the Bar of

Vermont from other jurisdictions which have refused to apply heightened scrutiny based on the Supreme Court's *Bowers* decision,[258] though good law at the time, because Vermont had long repealed its anti-sodomy statute, and further, because Vermont had a general policy of prohibiting discrimination based on sexual orientation.[259]

Judge Dooley then endorsed the decision of *Tanner v. Oregon Health Sciences University*[260] in which the Oregon Court of Appeals found that a classification based on sexual orientation merited heightened scrutiny under equal protection analysis.[261] Judge Dooley considered the Oregon decision particularly applicable because, like the Vermont Supreme Court, the Oregon Supreme Court had adopted the federal, tiered framework for equal protection challenges under state law (though the majority opinion in *Baker* chose to veer from that framework), and both states shared similar language in the relevant sections of their state constitutions.[262]

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the City of N.Y. Comm. on Lesbian and Gay Rights, Comm. on Sex and Law, and Comm. on Civil Rights, *Report on Marriage Rights for Same-Sex Couples in New York*, 13 Colum. J. Gender & L. 70 (2004); Wendy Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-Sex "Marriage"?*, 12 B.U. Pub. Int. L.J. 137 (2002); Veronica C. Abreu, Note, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment's Due Process Clause*, 44 B.C. L. Rev 177 (2002); and Kevin Aloysius Zambrowicz, Comment, *"To Love and Honor All the Days of Your Life": A Constitutional Right to Same-Sex Marriage?*, 43 Cath. U. L. Rev. 907 (1994). For a discussion on treating sexual orientation classifications as sex-based classifications, see generally Hunter, *supra* note 53; and Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994).

258. *See supra* notes 69-73 and accompanying text.

259. *Baker*, 744 A.2d at 891 (Dooley, J., concurring). The *Goodridge* opinion also made note of Massachusetts's "strong affirmative policy of preventing discrimination on the basis of sexual orientation" and that it too had decriminalized private consensual adult conduct. *Goodridge*, 798 N.E.2d at 967. The United States Congress has yet to enact any such antidiscrimination legislation regarding sexual orientation; an updated hate crimes bill that would have included sexual orientation among race, color, religion, national origin, gender, and disability as a basis for punishment for those who commit violent crimes based on one of the listed factors failed to pass in 2003 or 2004. *See* Local Law Enforcement Hate Crimes Prevention Act of 2004, H.R. 4204, 108th Cong. § 7(a) (2004); Local Law Enforcement Enhancement Act of 2003, S. 966, 108th Cong. § 7(a) (2003). A proposed Employment Non-Discrimination Act that would have prohibited employment discrimination on the basis of sexual orientation failed to pass the Senate by one vote in 1996, and subsequent versions have not come up for a vote in either house. *See* Eskridge & Hunter, *supra* note 2, at 1545; Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. §2 (2003); Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. § 2 (2003).

260. 971 P.2d 435 (Or. Ct. App. 1998).

261. *Baker*, 744 A.2d at 892-93 (Dooley, J., concurring) (discussing *Tanner*, 971 P.2d at 447).

262. *Id.* at 891-93 (citing Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 976 (Or. 1982)). The relevant portion of the Oregon Constitution provides, "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities,

The *Tanner* court ruled on the unlawfulness of a public university's denial of insurance benefits to domestic partners of its homosexual employees.[263] In doing so, the court determined that suspect class status should depend on whether the characteristic used for classification has been "historically regarded as defining [a] distinct, socially-recognized group[] that [has] been the subject of adverse social or political stereotyping or prejudice" rather than focus on the immutability of the characteristic.[264] The court then determined that sexual orientation, like gender, race, and alienage was such a group.[265] The university had insisted that benefits were available to the spouses of all married employees—heterosexual and homosexual alike.[266] The court responded, "[t]hat reasoning misses the point . . . . Homosexual couples may not marry. Accordingly, the benefits are . . . made available on terms that, for gay and lesbian couples, are a legal impossibility."[267]

After endorsing the *Tanner* reasoning for applying heightened scrutiny for sexual orientation classifications, Judge Dooley analyzed the effects of ostensibly using rational basis review to scrutinize governmental interests as the majority did, but in reality applying a higher standard.[268] Because the majority did not hold that the restriction on marriage involved a suspect class or burdened a fundamental right, he found that the court had "no justification for the holding that Article 7 [of the Vermont Constitution] requires a more activist approach than the Fourteenth Amendment for reviewing social welfare and economic legislation."[269] The effect of its activist approach, he wrote, was that "the State now bears no higher burden to justify discrimination against African-Americans or women than it does to justify discrimination against [any non-suspect class]."[270] Fearing that the majority had encroached upon the fundamental nature of separation of powers, he concluded,

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which, upon the same terms, shall not equally belong to all citizens." Or. Const. art. I, § 20; *see also supra* note 231 and accompanying text.

263. *Tanner*, 971 P.2d at 441.

264. *Id.* at 446.

265. *Id.* at 447. Though the court did not directly consider immutability, as it was unnecessary for its holding, it implicitly recognized sexual orientation as an innate, self-defining trait. *See id.* at 446-47.

266. *Id.* at 447.

267. *Id.* at 448. The *Baker* concurrence and the *Tanner* opinion follow the line of scholarly commentary that supports the notion that the Supreme Court may be on the verge of finding, and ought to find, gays and lesbians to be a suspect class, should the question eventually present itself. *See supra* notes 103-17 and accompanying text.

268. Baker v. State, 744 A.2d 864, 894-97 (Vt. 1999) (Dooley, J., concurring).

269. *Id.* at 896. Judge Dooley contended that the appropriate test for a challenge to Article 7 was the same as under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 894-95 (citing Lorrain v. Ryan, 628 A.2d 543, 550 (Vt. 1993)).

270. *Id.* at 894.

> I cannot endorse, in this vitally important area of constitutional review, a standard that relies wholly on factors and balancing, with no mooring in any criteria or guidelines, however imperfect they may be.... [T]he balancing and weighing process set forth in the Court's opinion describes exactly the process we would expect legislators to go through if they were facing the question before us.... We are judges, not legislators.[271]

In his dissent in *Goodridge*, Judge Sosman directly stated Judge Dooley's point: "To reach the result it does, the court has tortured the rational basis test beyond recognition."[272]

### 2. *Castle v. State*[273]

In *Castle v. State*, a Washington State Superior Court became the only court—besides the *Tanner* court in Oregon[274]—that has employed heightened scrutiny when addressing sexual orientation classifications, this time in the context of determining the validity of Washington State's Defense of Marriage Act ("DOMA").[275] Like the *Baker* and *Goodridge* courts, the *Castle* court acknowledged that the privileges or immunities clause of Washington's State Constitution would govern rather than the comparable Federal Equal Protection Clause.[276] Although both guarantee that "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment," the court found that the state clause may be more protective of individual rights.[277] Relying in part on the *Tanner* opinion, because of the great similarities of the Oregon and Washington State Constitutions and the consequent parity of Oregon

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271. *Id.* at 897 (citations omitted).

272. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 982 (Mass. 2003) (Sosman, J., dissenting). Claiming that the *Goodridge* opinion represented impermissibly aggressive judicial activism, one Massachusetts citizen along with a group of Massachusetts legislators acting in their individual capacities, sued the Massachusetts Supreme Judicial Court, alleging that its opinion "effected an impermissible amendment of the state constitution" violating separation-of-powers principles by redefining marriage in clear opposition to the Massachusetts Constitution's pre-existing definition of marriage as a union between one man and one woman. *See* Largess v. Supreme Judicial Court, 373 F.3d 219, 223 (1st Cir.), *cert. denied*, 125 S. Ct. 618 (2004). This state violation, in turn, violated their rights under the Guarantee Clause of the Federal Constitution, U.S. Const. art. IV, § 4, by "depriving them of a republican form of government." *Largess*, 373 F.3d at 223. The First Circuit rejected these claims, finding that the Supreme Judicial Court did not overreach, and that the Massachusetts Constitution provides an adequate amendment process that eliminates any threat to Massachusetts' republican form of government. *Id.* at 229.

273. Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *1 (Wash. Super. Ct. Sept. 7, 2004).

274. *See supra* notes 260-67 and accompanying text.

275. *Castle*, 2004 WL 1985215, at *1.

276. *Id.* at *10.

277. *Id.* (citation omitted).

and Washington jurisprudence, the *Castle* court held that homosexuals constitute a suspect class requiring a higher level of scrutiny than mere rational basis review.[278]

Applying heightened scrutiny, the court found that if the state's compelling interest is "to encourage procreation and stable environments for children,"[279] then the state DOMA sweeps too broadly and is not narrowly tailored to such an interest, because the statute in practice invalidates "forms of family that the community recognizes and supports"[280] through second-parent adoption[281] and adoption by gay individuals and couples.[282] The court also found the legislature's stated rationale—that "[i]t is a compelling interest of the State of Washington to reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution"—to be insufficient.[283] The court found this to be a "conclusory statement . . . devoid of any meaningful content" because a justification based on a "historical commitment"[284] or maintenance of the status quo could be used to prevent any change in law.[285]

Implicitly acknowledging that such a due process rationale may not suffice under an equal protection analysis, the court asked, "what compelling interest to our community does such a historical commitment further when compared to the fundamental intent of equality?"[286] In acknowledging that the issue of same-sex marriage had both moral and legal components, the court observed that the government can concern itself only with the legal.[287] The court thus distinguished the morality of the majority or that of any particular class from "the conscience of the community" which the court felt must prevail in a democracy where people with different values live together as one people and one community.[288]

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278. *Id.* at *11 (noting that Oregon's privileges or immunities clause which provided the foundation for the *Tanner* decision was the "source clause" for Washington's privileges or immunities clause).

279. *Id.* at *16.

280. *Id.*

281. Second-parent adoption involves an unmarried partner's adoption of his or her partner's child(ren) without the original parent's abrogation of his or her parental rights. For a discussion on second-parent adoption as an inroad to the rights of gay men and lesbians to marry, see Vincent C. Green, Note, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 Brook. L. Rev. 399 (1996).

282. *Castle*, 2004 WL 1985215, at *16.

283. *Id.* at *14 (citation omitted).

284. *Id.*

285. *Id.*

286. *Id.* (finding that any historical commitment to restricting marriage to one man and one woman was not sufficient to override the stronger interest in equality).

287. *Id.* at *17.

288. *Id.*

## III. ADDING AND ACKNOWLEDGING THE BITE

As the disparate case law demonstrates, the Supreme Court's failure to articulate its rational basis with bite test or outline the circumstances in which it should be applied has led to two particular problems in subsequent equal protection jurisprudence as applied to sexual orientation classifications.[289] The first problem involves the inconsistencies of equal protection jurisprudence among and within the circuits that have chosen to apply traditional rational basis review,[290] thus ignoring the broader scope and intent of the *Romer* and *Lawrence* decisions.[291] The second problem is that those courts that choose to apply rational basis with bite in the spirit of *Romer* and *Lawrence* face harsh criticism—even from those who agree with the outcome—that they are using an amorphous form of heightened scrutiny in the guise of rational basis.[292] Such use, it is claimed, fundamentally changes the form of the traditional standard of review with unknown consequences for equal protection jurisprudence more generally.[293]

This part first analyzes the consequences of the Supreme Court's failure to articulate its rational basis with bite approach to sexual orientation classifications as seen through a comparison of the "interest free" and "interest asserted" cases discussed above.[294] This problem is further demonstrated by the decisions in *Equality Foundation* and *Limon*, both of which failed to follow their respective Supreme Court precedents of *Romer* and *Lawrence*.[295] Finally, this part explores how the use of rational basis with bite—that is, using heightened scrutiny under the guise of rational basis review—subjects such opinions to significant criticisms for departing from equal protection jurisprudence and engaging in judicial activism.[296]

### A. *Federal Court Inconsistencies: Contradicting* Romer *and* Lawrence

The lower courts' use of rational basis review in dealing with sexual orientation classifications has led not only to inconsistencies among

289. The need to articulate the rational basis with bite approach stems from the fact that Supreme Court has yet to explicitly address the issue of whether homosexuals constitute a suspect class and the Court's consequent use of rational basis review in the absence of answering this underlying question. *See supra* note 212 and accompanying text.

290. *See supra* Part II.A.

291. *See supra* Parts I.B.2-3.

292. *See supra* notes 268-72 and accompanying text.

293. *See supra* notes 268-72 and accompanying text; *see also* Romer v. Evans, 517 U.S. 620, 651-52 (1996) (Scalia, J., dissenting) (describing the majority's opinion as "employ[ing] a constitutional theory heretofore unknown" and having invented "a novel and extravagant constitutional doctrine").

294. *See infra* notes 297-307 and accompanying text.

295. *See infra* notes 308-40 and accompanying text.

296. *See infra* Part III.B.

and within certain circuits, but also has resulted in decisions clearly at odds with the Supreme Court's holdings in *Romer* and *Lawrence*.[297] For a clear example, in 1996, in *Nabozny*, the Seventh Circuit found that a public school's failure to curb the harassment of a student based on his sexual orientation amounted to an equal protection violation[298] and yet six years later, in *Schroeder*, the same circuit held that a public school's failure to similarly address the concerns of a gay teacher did not constitute discrimination.[299] The difference in outcome stems from the government's assertion of interests in *Schroeder* and its failure to do so in *Nabozny*.[300] And yet, the interests cited in *Schroeder*—the school's limited resources and commensurate right to prioritize the use of those resources—are not rationally related to the school district's decision to adopt a laissez faire approach towards preventing the continued harassment of the plaintiff.[301] The *Schroeder* court failed to distinguish a true legitimate interest in permitting discrimination from an excuse for failing to curb it.[302]

Instead, the court focused on the school's right not to institute a separate policy against sexual orientation discrimination.[303] The *Schroeder* court wrote, "there is no simple way of explaining to young students why it is wrong to mock homosexuals without discussing the underlying lifestyle or sexual behavior associated with such a designation."[304] This statement disregards that in *Nabozny* this same circuit found an equal protection violation stemming from student behavior, implicitly requiring such an explanation to prevent the continued sexual orientation discrimination of a student facing abuse not unlike that faced by Schroeder.[305] Further, as the *Schroeder* dissent noted, "[i]t would have been easy enough, as part of the philosophy of 'courtesy to all' that the majority advocates, to prohibit certain words or actions without a detailed discussion of the sexual

297. *See supra* Part II.A.2.a.

298. *See supra* notes 144-47 and accompanying text.

299. *See supra* notes 181-87 and accompanying text.

300. *Compare supra* notes 144-47 and accompanying text, *with supra* notes 183-87 and accompanying text (comparing the Seventh Circuit's analysis in *Nabozny* with its analysis in *Schroeder*). Similarly, in 1997, the Sixth Circuit held that a sexual orientation classification involving selective prosecution violated equal protection in the absence of an asserted governmental interest, but upheld a city charter classification in the presence of asserted interests. *Compare supra* notes 148-52 and accompanying text, *with supra* notes 192-200 and accompanying text (comparing the Sixth Circuit's analysis in *Stemler* with its analysis in *Equality Foundation*).

301. *See* Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 961 (7th Cir. 2002) (Wood, J., dissenting). Judge Wood went so far as to openly mock the school district's assertion of insufficient resources as a rational justification for its failure to address the plaintiff's concerns. *Id.; see supra* note 224.

302. *Id.*

303. *Id.* at 954.

304. *Id.*

305. Nabozny v. Podlesny, 92 F.3d 446, 457-58 (7th Cir. 1996).

behavior of adults," and still the school failed to do so.[306] Moreover, the majority completely omitted *Romer* from its analysis whereas the dissent noted that, under *Romer*, a state or state actors may not "deliberately either omit altogether or give a diminished form of legal protection from verbal or physical assaults to individuals in certain disfavored classes."[307] Because of its failure to apply the "more searching" form of rational review, the *Schroeder* decision stands as a direct contradiction to the holding in *Romer*.

Similarly inconsistent with the Supreme Court holdings in *Romer* and *Lawrence* are the Sixth Circuit's decision in *Equality Foundation*[308] and the Kansas appellate court's decision in *Limon*,[309] both cases remanded by the Supreme Court in light of *Romer* and *Lawrence* respectively.[310] The Sixth Circuit, refusing to acknowledge the import of the *Romer* decision, chose a very literal approach to applying *Romer* in its *Equality Foundation* ruling by employing the traditional and extremely deferential form of rational basis review.[311] The Seventh Circuit, in its *Nabozny* opinion, even criticized the Sixth Circuit's *Equality Foundation* opinion, finding that its analysis "conflate[s] the requirement that discrimination be based on membership in a definable class to trigger equal protection analysis with the requirement that the class have 'obvious, immutable, or distinguishing characteristics' to trigger heightened or strict scrutiny."[312] This points to an inherent flaw in the *Equality Foundation* holding: Article XII was not, as the court and its reliance on *Bowers* implies, a classification based on homosexual conduct; rather, it was a classification based on sexual orientation and identity, meaning that even if one does not consider homosexuality an immutable trait, it nonetheless is sufficient to define a class for discriminatory or classification purposes.[313]

Further, the *Equality Foundation* court gave credence to asserted governmental interests that the *Romer* court clearly deemed

306. *Schroeder*, 282 F.3d at 960 (Wood, J., dissenting).

307. *Id.* at 961.

308. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997); *see supra* notes 192-97 and accompanying text.

309. State v. Limon, 83 P.3d 229 (Kan. Ct. App. 2004), *review granted*, No. 00-85898-AS, 2004 Kan. LEXIS 284 (Kan. May 25, 2004); *see supra* notes 201-11 and accompanying text.

310. *See* Limon v. Kansas, 539 U.S. 955 (2003); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001 (1996).

311. *See supra* note 200 and accompanying text. Clearly, that part of the *Equality Foundation* opinion relying on *Bowers* to deny any form of heightened scrutiny to sexual orientation classifications is no longer applicable in light of *Lawrence*. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

312. Nabozny v. Podlesny, 92 F.3d 446, 457 n.10 (7th Cir. 1996) (citations omitted).

313. *But cf.* Romer v. Evans, 517 U.S. 620, 641-42 (1996) (Scalia, J., dissenting) (refusing to acknowledge the distinction between homosexual conduct and homosexual orientation).

insufficient to support a classification like that in Article XII. The *Equality Foundation* court wrote that "*Romer* supplied no rationale for subjecting a purely local measure of modest scope, which simply refused special privileges under local law for a non-suspect and non-quasi-suspect group of citizens, to any equal protection assessment other than the traditional 'rational relationship' test."[314] To the contrary, *Romer*, while certainly giving credence to the broader statewide scope of Colorado's Amendment 2, focused on the substance of the enactment, writing that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[315] In its failure to apply rational basis with bite, the Sixth Circuit's opinion is a discomforting misreading of the *Romer* decision.

In content, Article XII differed minimally from Amendment 2 and consequently the *Equality Foundation* court should have explored the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[316] This "inference" is the bite the *Equality Foundation* court refused to apply. Had it done so, it would have dismissed the proffered interests of associational freedom and the conservation of resources as mere pretext for underlying animus as the *Romer* court had, and likely intended the *Equality Foundation* court to do when it remanded the case to the Sixth Circuit for reconsideration.[317]

The *Equality Foundation* case demonstrates the need for making homosexuals a suspect class or, at minimum, better articulating the "more searching" rational basis review to ensure that one piece of discriminatory legislation does not stand while another is struck down.

Just as the *Equality* court failed to acknowledge the import of *Romer* on remand from the Supreme Court, the Kansas appellate court's resolution of *Limon* similarly failed to take into account the import of *Lawrence* on remand. It is a well-accepted principle that the state may not enforce facially neutral laws differently against different segments of the population based on an arbitrary desire to

314. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 298-99 (6th Cir. 1997).

315. *Romer*, 517 U.S. at 633.

316. *Id.* at 634.

317. After initially remanding the case to the Sixth Circuit and the Sixth Circuit's subsequent ruling discussed herein, the Supreme Court denied a petition for a writ of certiorari with Justice Stevens, joined by Justices Souter and Ginsburg, writing that the denial was not a ruling on the merits and did not reflect any interpretation as to the proper construction of the city charter amendment; rather, Justice Stevens noted that the Court does not normally make an independent examination of state law questions resolved by a court of appeals. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 525 U.S. 943 (1998) (denying certiorari).

discriminate against one group.[318] Concurring in *Lawrence*, Justice O'Connor emphasized this point in relation to the treatment of homosexuals.[319] As the dissent in *Limon* pointed out, Limon did not contend that his conduct should not be punishable, but rather that the great disparity in punishment based on the sex of the participants, and thus his sexual orientation, violated equal protection; in other words, the valid interest in protecting children applies regardless of the sex of the participants.[320]

The dissent rightly found it "incomprehensible" that laws regarding sexual conduct between minors have any rational relationship to the state's asserted interests of advancing the family or encouraging marriage and procreation between the victim and assailant.[321] Though the dissent also ostensibly used rational basis review, it echoed the "bite" implicit in the *Lawrence* opinion when it wrote, "[s]imply because a majority of the legislature thinks something is immoral does not mean it can . . . be free from having that decision reviewed by the courts. . . . Legislative disapproval of homosexuality alone is not enough to justify any measures the legislature might choose to express its disapproval."[322]

The *Limon* dissent, despite its logic and adherence to the spirit of *Lawrence*, still has two flaws, though one not necessarily insurmountable. *Lawrence*, as the majority and concurring opinions in *Limon* point out, was a due process holding based on an individual's right to privacy implicit in the Fourteenth Amendment and thus can be distinguished from a claim grounded in equal protection where the status of the underlying conduct is not in question, just the classification of the participants who engage in that conduct.[323] The *Lawrence* majority opinion, though based on due

318. *See, e.g.*, Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886); Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997).

319. Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

320. State v. Limon, 83 P.3d 229, 244 (Kan. Ct. App. 2004) (Pierron, J., dissenting), *review granted*, No. 00-85898-AS, 2004 Kan. LEXIS 284, at *1 (Kan. May 25, 2004). The dissent reframed the issue to be whether it is constitutional that a sentence for the commission of an identical act can be more than fifteen times as long because the participants were of the same sex. *Id.* at 245.

321. *Id.* at 247.

322. *Id.* at 246.

323. *See supra* note 208 and accompanying text. In his concurring opinion in *Watkins v. United States Army*, Judge Norris made a similar distinction finding that the due process holding of Bowers did not apply to equal protection claims based on sexual orientation. Watkins v. United States Army, 875 F.2d 699, 716 (9th Cir. 1989) (Norris, J., concurring); *see supra* notes 74-79 and accompanying text. Professor Sunstein similarly distinguished the role of due process (protecting traditional and historical practices and values), from the role of equal protection (serving the norm of

process, provides implicit support for a finding that the Texas anti-sodomy statute also violated equal protection. First, the *Lawrence* majority based its decision on the Due Process Clause rather than the Equal Protection Clause to avoid the implication that a neutral law prohibiting consensual adult conduct would be permissible.[324] Had the Court relied solely on equal protection, a state would be free to prohibit any consensual, private sexual conduct as long as the prohibition applied to homosexuals and heterosexuals alike.[325] Second, the majority described Justice O'Connor's concurring equal protection argument as "tenable," but chose to rely on due process because doing so "advances both interests."[326] Given this understanding, it appears that a majority of the Justices did indeed support the notion that a law distinguishing private consensual conduct based on sexual orientation did violate equal protection. As such, the *Limon* dissent could have found reasonable support in *Lawrence* to find that the Kansas statute similarly violated equal protection, though the *Lawrence* majority opinion ostensibly relied only on due process.

The less surmountable flaw of the *Limon* dissent is recognized in the concurrence which found it conceivable that the perceived increased health risks associated with homosexual activity might justify the distinction because, in the circumstances, the participants were not of consenting age and could not legally accept those risks.[327] This flaw too would be eradicated had the Supreme Court in *Lawrence* acknowledged its use of heightened scrutiny because, as the concurrence noted, this interest in protecting minors from possible increased health risks from homosexual activity is "tenuous" at best and could not be considered a substantial or compelling interest that would survive heightened scrutiny.[328] Therefore, just as the *Romer* Court's failure to acknowledge its use of heightened scrutiny led to a contradictory holding in *Equality Foundation*, the Supreme Court's failure to do so in *Lawrence* led to a parallel contradiction in *Limon*.

By continuing to use the traditional rational basis test in disregard of the *Romer* and *Lawrence* decisions, some courts[329] have eroded the base-line holdings of *Palmore v. Sidoti*—which held that private biases

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equality and expanding protection to those who are not served by a focus on history and tradition). *See* Sunstein, *supra* note 20, at 1179.

324. *Lawrence*, 539 U.S. at 575.

325. *Id.*

326. *Id.* at 574-75.

327. *Limon*, 83 P.3d at 242 (Malone, J., concurring); *see supra* note 209 and accompanying text. The concurrence, however, agreed with the dissent in finding most of the interests actually asserted by the government to be irrationally related to the classification. *Limon*, 83 P.3d at 242.

328. *See supra* notes 209-11 and accompanying text.

329. *See supra* Part II.A.

cannot be given credence in the law[330]—and *Department of Agriculture v. Moreno*, which held that a bare desire to harm a politically unpopular group cannot serve as a legitimate governmental interest.[331] Though relying on these cases, *Romer* and *Lawrence* went further by applying these well-accepted holdings to sexual orientation classifications, and more importantly, inferring that certain interests asserted by the government may merely be pretextual efforts to hide the underlying private biases of the community.[332]

Justice Scalia[333] and the *Equality Foundation*[334] and *Limon*[335] courts have refused to recognize this "inevitable inference" that a classification may be born of animosity rather than the asserted governmental interests and, further, that such animus, even with community approval, is not a valid or legitimate governmental interest for so classifying.[336] Protecting associational liberty and prioritizing scarce public resources as proffered in *Romer*[337] and *Equality Foundation*,[338] and protecting the welfare of children as proffered in *Limon*,[339] are certainly legitimate governmental interests in and of themselves. However, they cannot justify sexual orientation-based classifications that not only are insufficiently related to these objectives, but are imposed based on a community's general disapproval of gay men and lesbians.[340]

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330. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them."); *see supra* note 87 and accompanying text. In *Palmore*, a caucasian father lost his battle to regain custody of his child upon the remarriage of his ex-wife to a black man, claiming that rewarding him with custody was in the best interests of the child given the stigma she would suffer coming from an interracial home. *Palmore*, 466 U.S. at 430-31.

331. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *see supra* note 98 and accompanying text.

332. *See supra* notes 97, 126 and accompanying text. Though *Palmore* involved a racial classification and consequently employed strict scrutiny, it is worth noting how the *Romer* decision echoes *Palmore* in the manner it acknowledges the potential legitimacy of the government's asserted interests, but then dismisses those interests in light of the underlying presumption or inference that those interests are merely pretext for animus. In *Palmore*, the Court conceded that protecting the interests of minor children was a "duty of the highest order," but found that race was not a permissible basis on which to uphold that duty, *Palmore*, 466 U.S. at 433, just as in *Romer*, the Court recognized that associational liberty or conservation of scarce resources may be legitimate interests, but not sufficiently related to the sexual orientation-based classification, Romer v. Evans, 517 U.S. 620, 630-31 (1996).

333. *See supra* notes 100-02, 132-35 and accompanying text.

334. *See supra* notes 188-200 and accompanying text.

335. *See supra* notes 201-11 and accompanying text.

336. *See* Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (quoting *Romer*, 517 U.S. at 634).

337. *See supra* notes 97-98 and accompanying text.

338. *See supra* note 195 and accompanying text.

339. *See supra* notes 206-07 and accompanying text.

340. *See Romer*, 517 U.S. at 635 ("Amendment 2 . . . in making a general announcement that gays and lesbians shall not have any particular protections from

### B. *Criticisms of Rational Basis with Bite*

The rational basis with bite approach as applied in cases like *Baker* and *Goodridge*, though successful in striking down classifications based on sexual orientation, is also unsatisfactory due to the courts' failure to acknowledge explicitly their use of heightened scrutiny and thereby opening up those decisions to compelling criticism.[341] By claiming to use rational basis review, though actually scrutinizing the relationship between the asserted governmental interest and the classification, these decisions "torture" traditional rational basis review without explaining why these classifications merit less deference.[342] Employing heightened scrutiny under the guise of rational basis review is circuitous and ultimately may lead to greater resentment of bold judicial decisions[343] by making unfounded exceptions or modifying the appropriate standards rather than following the court's traditional framework, however imperfect it may be.[344]

As the *Baker* concurrence points out, such bold rational basis with bite decisions leave future application of the traditional rational basis review uncertain by allowing for the possibility that other traditionally non-suspect classifications (or infringements on non-fundamental rights) may deserve the added bite, or, conversely, that heightened scrutiny may no longer be necessary for recognized suspect classes.[345]

Additionally, such decisions become open to charges of social favoritism. The most prominent example stems from Justice Scalia's dissent in *Lawrence* in which he wrote, "[i]t is clear . . . that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[346] He added that what the Court calls "discrimination" is

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the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.")

341. *See supra* notes 100-02, 132-35, 268-72 and accompanying text. Though both the *Baker* and *Goodridge* courts relied on the arguably broader equal protection counterparts of the Vermont and Massachusetts Constitutions respectively, both courts in essence followed and cited generally accepted federal precedent in their equal protection and due process analyses, diverging only to the extent of adding bite to their rational basis review in line with *Romer* and *Lawrence*. *See supra* Part II.B.2. By limiting their holdings to their respective state constitutions, the Baker and Goodridge courts engaged in the type of judicial minimalism outlined by Professor Sunstein in that the holdings avoided addressing issues (the suspect class status of homosexuals under state or federal law and the prohibition of same-sex marriage under federal law) that were unnecessary to their holdings and could have broader consequences on matters beyond the issue at hand. *See* Sunstein, *supra* note 108.

342. *See supra* note 272 and accompanying text.

343. For an extreme example, see the discussion of *Largess v. Supreme Judicial Court, supra* note 272.

344. *See supra* notes 268-72 and accompanying text.

345. *See supra* note 270 and accompanying text.

346. Lawrence v. Texas, 539 U.S. 558, 602 (Scalia, J., dissenting). Though part of Justice Scalia's argument regarding the Court's unconventional use of rational basis

rather the majority's right to protect themselves and their families from a lifestyle that they believe to be immoral and destructive.[347] Justice Scalia has failed to take to heart the teachings of *Palmore* and *Moreno*, let alone that many of the judicial victories of the civil rights movement resulted from the discrediting of such majoritarian morality or disapproval.[348]

Applying heightened scrutiny to sexual orientation classifications—and acknowledging its application—solves the problem of federal court jurisprudence inconsistent with the holdings of *Romer* and *Lawrence* and removes the backbone of criticisms that decisions thoroughly analyzing the asserted governmental interests are defying traditional rational basis review. As the *Baker* concurrence and *Goodridge* majority point out, each of their respective states had a political climate that is anathema to status discrimination against homosexuals based, in part, by each state having repealed their anti-sodomy statutes years earlier among other efforts to accommodate "the changing realities of the American family."[349] With the overruling of *Bowers* by *Lawrence*, the United States as a whole moved towards more tolerance. At a minimum, *Lawrence* does away with the *Bowers-Padula* line of reasoning, cited by Scalia in his *Romer* dissent, that if a jurisdiction may criminalize homosexual conduct, it may certainly discriminate on that basis.[350]

*Lawrence* did more than that, though. Even though the *Lawrence* majority did not base its ruling on Justice O'Connor's "more searching" review under equal protection, it characterized that argument as "tenable" and recognized that its broader due process holding achieved the same end, but with greater protection for

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review would be rendered moot if the Court were to treat gay men and lesbians as a suspect class, it is likely that Justice Scalia would consider even that determination as to suspect class status part of the Court's choosing sides in the culture war.

347. *Id.*

348. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (holding Virginia's anti-miscegenation statute criminalizing interracial marriage to be unconstitutional); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding the policy of "separate but equal" to be unconstitutional and ordering the desegregation of public schools).

349. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 963 (Mass. 2003) (citing Troxel v. Granville, 530 U.S. 57, 64 (2000)); *see also supra* note 259 and accompanying text.

350. *See supra* notes 67-73 and accompanying text; *see also* Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting). The courts that have relied on *Bowers* in applying rational basis review to sexual orientation classifications have done so by relying on the false premise that sodomy may be used to define the class of gay people simply because such conduct could be legally prohibited. *See* Feldblum, *supra* note 5, at 285. An anecdote from the Senate hearings on the military's ban on gay service members involved Senator Strom Thurmond's adamant and loud assertions to Senator John Kerry of Massachusetts that "[h]eterosexuals don't practice sodomy" and Senator Kerry's attempt to educate the Senator from South Carolina to the fact that, indeed, some heterosexuals do commit sodomy. *Id.* at 285-86 (citing *Senators Loudly Debate Gay Ban*, N.Y. Times, May 8, 1993, at A9).

private, adult consensual conduct in general.[351] This implicit endorsement indicates that *Lawrence* may and, in any event, should lead to heightened scrutiny for sexual orientation classifications just as *Reed* led the way for gender classifications.[352]

## CONCLUSION

Without a comparable holding in a federal court of appeals, Washington State's *Castle* opinion—finding that gay men and lesbians constitute a suspect class meriting heightened scrutiny and invalidating Washington's DOMA in the absence of any compelling government interest—currently serves as the most substantiated holding on constitutional grounds that has thus far been issued. This opinion should serve as a model for the numerous state and federal courts that may soon address the validity of sexual orientation classifications and whether gay men and lesbians constitute a suspect or quasi-suspect class meriting some form of heightened scrutiny.[353] By acknowledging that gay men and lesbians meet the requisite factors for suspect or quasi-suspect class status and applying heightened scrutiny,[354] sexual orientation classifications will require evidence of important or compelling governmental interests that are, at minimum, substantially related to the classification. This acknowledgement of what the Supreme Court, in practice, has already established will eliminate the need for the heretofore elusive, undefined, and controversial rational basis with bite level of scrutiny. Using similar analyses as the *Baker* and *Goodridge* majorities, but applying heightened scrutiny, the *Castle* opinion acknowledges the standards by which it renders its analysis.[355] By doing so, *Castle* eliminates any potential inconsistency with the *Romer* and *Lawrence* holdings and minimizes criticism of social favoritism or judicial activism by basing its holding on the stronger foundation of heightened scrutiny based on the suspect or quasi-suspect status of gay men and lesbians. Given the obstacles facing the proponents of equal rights, contestable jurisprudence need not be one of them.

351. *See* Stein, *supra* note 103, at 274; *see also supra* notes 324-26 and accompanying text.

352. Stein, *supra* note 103, at 282-83; *see also supra* notes 104-07 and accompanying text.

353. *See supra* Part II.C.2.

354. *See supra* Part I.A.2.

355. *See supra* Part II.C.2.